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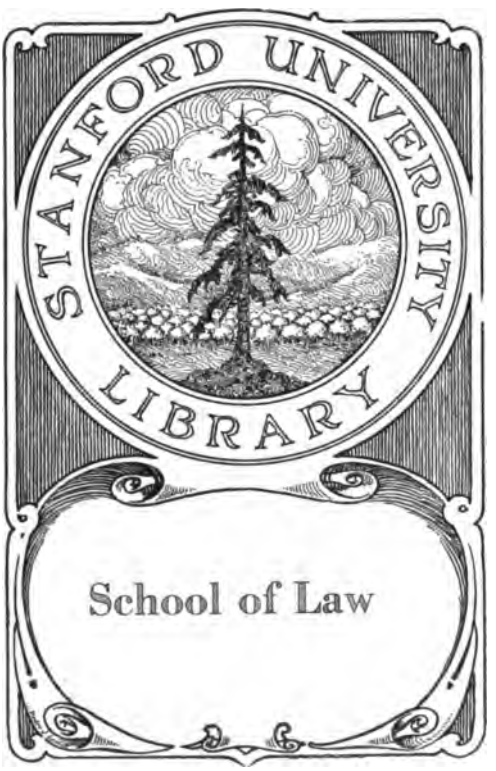
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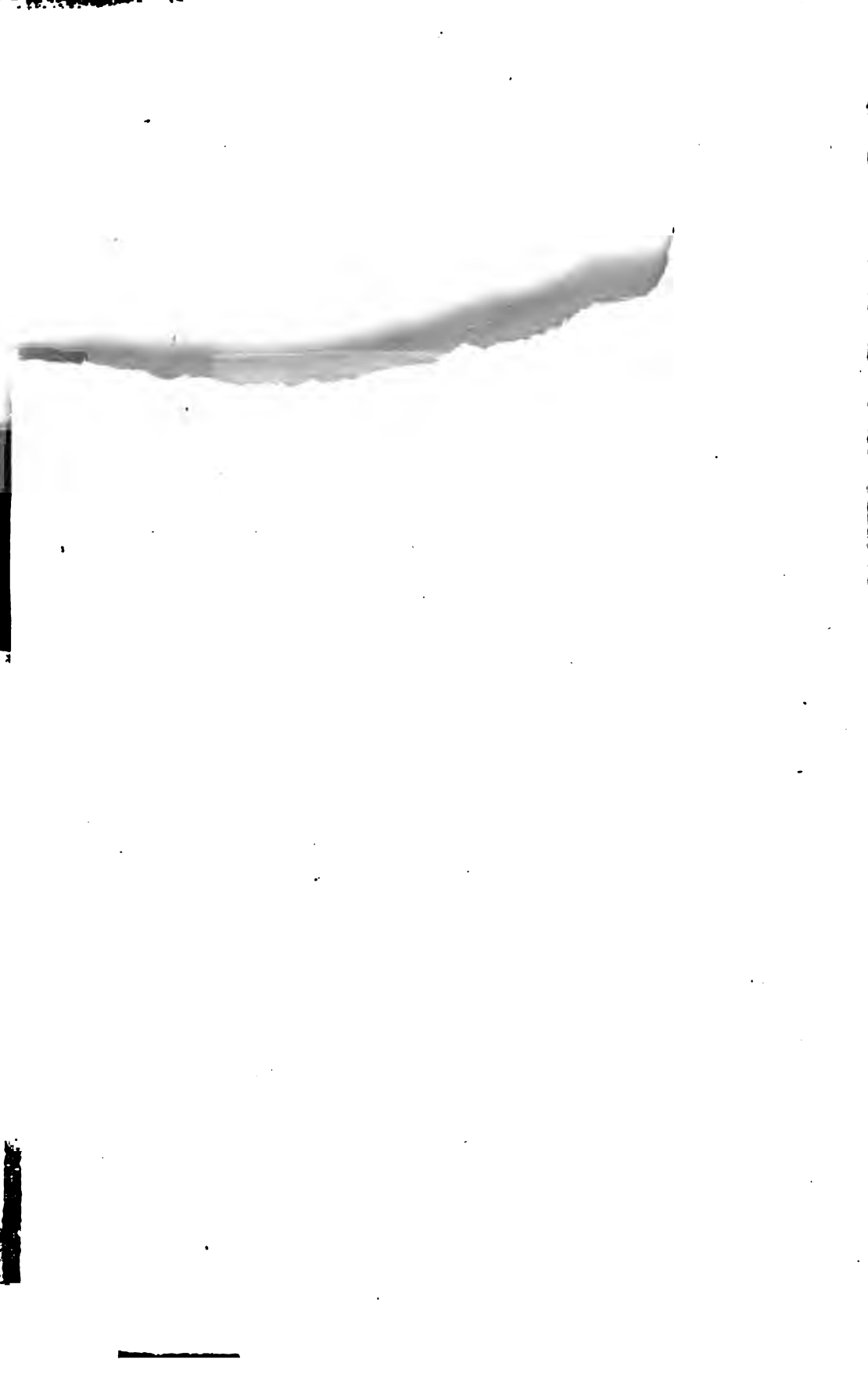

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DIARY FOR JANUARY.

1. Wed.. *Circumcision.* Taxes to be computed from this date.
2. Th. .. Error and Appeal Sittings.
5. SUN.. *2nd Sunday after Christmas.*
6. Mon.. *Epiphany.* County Court and Surrogate Court Term begins. Municipal Elections. Heir and Devisee Sittings commence.
7. Tues.. Last day for Township, Village and Town Clerks to make returns to County Clerk.
8. Wed.. Election of School Trustees,
11. Sat .. County Court and Surrogate Court Term ends.
12. SUN.. *1st Sunday after Epiphany.*
13. Mon.. Election of Police Trustees in Police Village.
15. Wed.. Treasurer and Chamberlain of Municipality to make return to Board of Auditors. School Reports to be made to Local Superintend't.
18. Sat .. Articles, &c., to be left with Secretary of Law Society.
19. SUN.. *2nd Sunday after Epiphany.*
20. Mon.. Members of Municipal Councils (excepting Co's) and Trustees of Police Villages to hold first meeting.
21. Tues.. Heir and Devisee sittings end.
25. Sat. .. *Conversion of St. Paul.*
26. SUN.. *3rd Sunday after Epiphany.*
28. Tues.. 1st meeting County Council.
29. Wed.. Appeals from Chancery Chambers (except in all cases during Examination Term).
30. Th. ... School Financial Report to Board of Auditors.
31. Fri. .. Last day for Counties and Cities to make returns to Provincial Secretary.

THE

Canada Law Journal,

JANUARY, 1868.

1868.

Great changes have taken place in the political aspect of this country during the past year. These changes call for notice from us only so far as they affect ourselves. Upper Canada and Lower Canada are, in name, no more. Nova Scotia and New Brunswick have cast in their lot with us, and *Canada* as a unit, comprising four provinces, has become a dominion.

As the oldest legal periodical in the four provinces, and as the organ of the profession in the largest and wealthiest of them, we may claim, without fear of contradiction, or, we think, without the danger of being considered presumptuous, the right of representing not only the profession of Ontario, but that of the Dominion at large.

Earnestly desiring to increase as well the usefulness as the sphere of usefulness of this journal, we shall spare no exertion on our part to do what lies in our power to effect the desired end. We at the same time think we have the right to call upon all those interested in their profession to assist us in our exertions, and the more so as our work has hitherto been almost entirely a labour of love. We are willing that it should so continue, if need be, but we hope nevertheless that the good sense of the profession will induce them to do their part of the work with more regard to our right to an increased measure of support (not only as to the number of our subscribers, but as to the payment of what they owe after they have subscribed), and with more regard to their own interests, by furnishing us with such information as may be interesting and instructive to our readers in general.

In this latter respect we have to thank many earnest friends for material assistance, and amongst these several rising men who will hereafter, we doubt not, be ornaments to their profession.

MEMORIALS AS SECONDARY EVIDENCE

It is hoped that the following remarks may be of service in those very numerous cases wherein evidence has to be given of conveyances which are not forthcoming. The subject is treated of, 1st, as to the search requisite to let in secondary evidence; 2nd, how far a memorial executed by a grantor is evidence of the matters therein stated; 3rd, how far it is evidence if executed by a grantee; 4th, the distinction between the evidence furnished by a memorial in ejectment, and as between a vendor and purchaser, or under the act for quieting titles; and 5th, as to proof of execution.

It frequently happens that secondary evidence of a missing document or title deed is rejected in consequence of the insufficiency of the search for the original.

Parties who search for a missing conveyance with a view to let in secondary evidence should bear in mind that the person entitled to the first immediate estate of freehold is the person entitled to retain the custody of the title deeds as against those entitled to ulterior estates in remainder or reversion; and that the deeds are presumed to follow the title and to go into the custody of those entitled. (*Moriarty* v. *Grey*, 12 Ir. C. L. Rep. 141, per O'Brien, J.; Sug. Vendors, ch. 11, s. 4; see also *Marvin* v. *Hales*, 6 U. C. C. P. 211, post; but see Sug. ch. 11, sec. 4, cl. 23, as to the right to the deeds of the mere grantee or releasee.

to uses.) When the land descends to real representatives, they, and not the personal representatives, are entitled to the deeds, though for greater certainty a search with the latter would be advisable, especially in the case of a missing mortgage. The presumption that the deeds follow the title and go to him entitled may be destroyed; as for instance, by the fact that they covered other lands retained by the vendor (*Yee* v. *Field*, 2 T. R. 708), or that some prior owner on sale of a portion gave a covenant to produce. Where a vendor on sale of a part of his lands retains the deeds and gives a covenant to produce, it does not follow that on conveyance of the residue the title deeds remain with him to answer his covenant to produce; on the contrary it would seem that in the absence of stipulation the vendee of the residue will be entitled to the deeds even against the prior vendee, and be bound by the covenant to produce as running with the lands (Sugden Vendors, ch. 11, s. 4, cl. 5). On sale of part of an estate without any stipulation as to the deeds, the holder of the portion of the highest value is entitled to the custody, whether seller or purchaser, giving a covenant to produce (Sugden Vendors, ch. 11, s. 4, cl. 5). Of joint owners, or tenants in common, coparceners and joint tenants, whichever of them obtains possession of the deeds is entitled to retain them, and the presumption would be that they would go to the grantee or heir at law of the possessor, except in the case of joint tenants, whose heir at law would not be entitled.

Where the instrument, if subsisting, should be in possession of a party to the cause, who desires to give secondary evidence, the proper course is that he should search with a witness, and that it should be "so conducted and in such places as to afford a reasonable ground for concluding that it was made *bona fide*, both as regards the witness and as regards the party, by giving and using all possible facilities to make it effectual." If he should himself have searched accompanied by a witness, but the witness should have made no search, and have accepted the statement of loss of such party as true, the search will not be sufficient (*Bratt* v. *Lee*, 7 U. C C. P. 280).

It may sometimes be that as against a person claiming the freehold mere notice to him to produce may suffice, without evidence of search, on the presumption above referred to, that the deeds follow the title and are in the possession of the party to whom notice is given (but see *Marvin* v. *Curtis*, 6 U. C. C. P. 212); for search would be useless with prior owners when the law would presume the title deeds were not with them, but passed from each prior owner to his grantee. That notice to produce alone should suffice, there must be nothing to destroy the presumption that the deeds followed the title, as, for instance, a covenant to produce given by a prior owner.

On a question of sufficiency of search, and proof of loss to let in secondary evidence, Richards, C. J., in a recent case *Russell* v. *Fraser*, 15 U. C. C. P. 380; (see also as to search *Ansley* v. *Breo*, 14 U. C. C. P. 371; *Gathercole* v. *Miall*, 15 M. & W., 319; *Doe Padwick* v. *Willcomb*, 6 Ex. 601, 5, 6; S. C. 4, H. L. Ca. 431,; Taylor on Evidence; *Smith* v. *Nevilles*, 18 U. C. Q. B. 473; Best on Evidence, 4 ed. 606; *Marvin* v. *Hales*, 6 U. C. C. P. 208; *Marvin* v. *Curtis*, id. 212; *Bratt* v. *Lee*, *supra*, 7 U. C. C. P. 280) expressed himself as follows:

"In *Rex.* v. *The Inhabitants of Kenilworth* (7 Q. B. 642), Lord Denman, in reference to a general rule established as to what is a sufficient search to let in secondary evidence said, 'I think that no general rule exists. The question in every case is whether there has been evidence enough to satisfy the Court before which the trial is had that, to use the words of Baily, J., in *Rex* v. *Denis*, 'A *bonâ fide* and diligent search was made for the instrument where it was likely to be found. But this is a question much fitter for the Court which tries than for us. They have to determine whether the evidence is satisfactory, whether the search has been *bonâ fide*, whether there has been due diligence, and so on. It is a mere waste of time on our part to listen to special pleading on the subject. To what employment shall we be devoted, if such matters are to be brought before us as matters of law? The Court below must exercise their own judgment as to the reasonableness of the search, taking into consideration the nature of the instrument, the time elapsed, and numerous other circumstances, which must vary with every case.'

"As to the diligence in the search necessary to let in secondary evidence, the following quotation from Taylor on Evidence seems to lay down the proper principles to be acted on by the courts: 'What degree of diligence is necessary in the search cannot easily be defined, as each

case must depend much on its own peculiar circumstances; but the party is generally expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. As the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary enquiry addressed to the discretion of the judge, the party offering secondary evidence need not on ordinary occasions have made a search for the original document as for stolen goods, nor be in a position to negative every possibility of its having been kept back.'"

In a recent case (*Reg.* v. *Hinckley*, 8 Law Times, N. S. 270) the following remarks were made:

"I think the only question is, if sufficient search has been made for the original. Now to determine this it must be shown that search has been made where the instrument would most probably be. It is for the presiding judge to decide whether reasonable evidence has been given to satisfy his mind that the document has been lost. But it is also a mixed question of law and facts which the court can subsequently review."

When sufficient evidence has been given of destruction of the original document, or of search and loss to let in secondary evidence, memorials afford, in cases of conveyance, a frequent means of furnishing such evidence, and are admissible or not, according to the circumstances.

When the plaintiff sought to make the defendant liable as assignee of a term on the covenants contained in a lease, and gave notice to produce the assignment, and then evidence by a memorial signed by the assignor, and further evidence that the defendant had taken proceedings in Chancery as assignee, the Court held that the memorial alone was not sufficient, but that coupled with the other facts of the case there was sufficient evidence to go to a jury (*Jones* v. *Todd*, 22 U. C. Q. B. 53).

Sir J. B. Robinson, C. J., in an ejectment suit (*Smith* v. *Nevilles*, 18 U. C. Q. B. 478) wherein the plaintiff sought to give in evidence a memorial signed by a *grantor*, under whom he claimed, but with whom the defendant who shewed no title *was not in privity*, after stating that there was not sufficient evidence of search to dispense with production of the original deeds, thus expresses himself:

"I have sometimes thought that such evidence as was offered in this case might without danger be admitted to prove the fact of the conveyance being made which is recited in the memorial, especially as against a defendant who has no title in himself; but the Legislature has not thought proper to make such evidence admissible without accounting for non-production of the deed, as is done with respect to bargains and sales enrolled under St. 10 Anne, ch. 18, s. 3."

Where the non-production of the original instrument was satisfactorily accounted for, a memorial signed by a *grantor*, who was not shewn to have had more than mere constructive possession by force of the conveyance to him, has been held to be evidence not merely against the grantor, and all claiming under or in privity with him, but also against third persons not appearing to have any title whatever except a bare possession of insufficient duration to confer a title, as being a statement and act by the party in possession against his own interest as reputed owner of the land (*Russell* v. *Fraser*, 15 U. C. C. P. 375, and cases there referred to; *Cathrow* v. *Eads*, 4 DeG. and Smales, 531; *Moriarty* v. *Grey*, 12 Irish C. L. Rep. 129; *Moulton* v. *Edwards*, 29 L. J. Ch. 181; see as regards third persons *Doe d. Loscombe* v. *Clifford*, 2 C. & K. 452; *Hayball* v. *Shepheard*, 25 U. C. Q. B. 536). This case is important as shewing that the memorial is evidence even though the grantor executing it never had more than constructive possession (for the lands were wild lands, and no evidence was given as to possession); and that under such circumstances it is evidence even against one not proven to claim in privity with the grantor.

The weight of authority is in favor of taking a memorial executed by a grantor as good secondary evidence even against strangers, without corroborative evidence; but it is not clear that this would be so if at the time of the conveyance sought to be proven someone were in possession adversely to the grantor.

If the memorial were rejected as evidence of the conveyance set forth in it, and the memorial shewed a bargain and sale for money paid, the party tendering it might perhaps as a last resource admit that the instrument set forth did not exist, and contend that the memorial itself was a good conveyance by way of bargain and sale. At common law a mere verbal bargain and payment to the bargainor raised a use, and he

held for the use of the bargainor. The Statute of Uses executed this use, and gave the legal estate bargained for to the bargainee. The Statute of Enrolments, it is true, required that a bargain and sale of a freehold should be by deed indented and enrolled; but neither enrolment, or registry to supply enrolment, are required here (Con St. c. 90, s. 14; *Rogers* v. *Barnum*, 5 U. C. Q. B. O. S. 252; *Doe d. Loucks* v. *Fisher*, 2 U. C. Q. B. 470), and a deed poll suffices (*Rogers* v. *Barnum*, *supra*). The requirements of the Statute of Frauds are complied with. The chief difficulty as to the operation of such a memorial *per se* as a conveyance would be on the question of intention.

Many of the principles whereon a memorial signed by a grantor is admissible, as evidence of a conveyance by him, do not apply where it is executed by a grantee. In the latter case it is a statement, not against, but in support of interest, and by a person not then in possession. Still such a memorial, if coupled with other facts confirmatory of the instrument set out in it, is admissible as parcel of the evidence towards proof.

A memorial executed by a *grantee* through whom a person claims, coupled with possession taken under the instrument to which it relates, and enjoyed for a length of time in a mode such as to preclude the probability of the instrument being other than as set forth by the memorial is good evidence, even against strangers, especially if accompanied by other corroborative facts, but the mere memorial would be evidence only against those claiming under or in privity with the grantee.

On this head a recent case (*Gough* v. *McBride*, 10 U. C. C. P. 166) affords most useful information. The plaintiff in ejectment claimed under a deed from one Arnold to one Gough, which he did not produce, and of which he offered as secondary evidence a memorial produced from the Registry Office, executed by Gough, the alleged grantee, with an affidavit of execution of the original deed by Arnold endorsed. The following is the judgment of the Court, delivered by Hagarty, J.:

"No possession appeared to have been taken under the alleged conveyance, and the title is now for the first time after a lapse of 53 years, sought to be established to a valuable property on this evidence.

The plaintiff's proposition may be thus stated, that on a witness proving that he saw a deed apparently answering the description contained in the memorial, and its loss, without further proof of hand-writing or genuineness, a memorial in the county registry executed by the grantee only, and proved by an affidavit endorsed of a witness who swore that he saw the conveyance duly signed by the grantor is, in the absence of any act done or possession taken, good secondary evidence of the original conveyance, and that a court and jury should be reasonably satisfied of the fact of such a deed having been duly executed, and that the estate duly passed thereunder. The proposition is startling, and can hardly be adopted except on the surest basis of reason and authority.

The first case I would refer to is *Scully* v. *Scully*, 10 Irish Eq. Rep. 557, appealed from the Irish Chancery to the Lords, 1825.

In 1816 a bill was filed setting up a marriage settlement executed in 1760, of which a memorial was registered in 1763. James Scully was alleged to have thereby covenanted with Lyons, father of the plaintiff, to settle on her (his intended wife) either by deed in his lifetime or by will, one-third of his estate. The memorial was only executed by Lyon the trustee. No deed was executed in grantor's lifetime. He died in 1816, and by his will left a large annuity to plaintiff "in full satisfaction of her claim on his property under her marriage articles or otherwise." She filed a bill asking to have her one-third under the articles. The defendant induced her to sign a memorandum on the will agreeing to confirm and abide by it. She charged that one Mahon, who took largely under the will, and was residuary devisee, had possession of the articles or knew where they were, and evidence was given to prove search, and that Mahon had declared he had either burned or thrown them away. The defendant admitted that they knew she claimed some right to testator's property in his life-time, but that she had solemnly assured him that she would waive all her rights and abide by his will on receiving the annuity of £1000, and testator on the faith thereof made his will.

Lord Chancellor Manners decreed in her favor, and considered the articles proved. In the Lords the case is argued at great length by Mr. Sugden and Sir C. Wetherall. Lord Eldon says: "The question in every case of this sort is whether all the testimony taken together offered as secondary evidence, is or is not sufficient to enable you to say that as you have not the writing itself you will act upon it as if you had it before you, and with an absolute certainty of what these articles contained. It is strongly the inclination of my opinion that this memorial does contain what were the articles of agreement between the parties." Again he says: "There is not a single

witness who speaks to conversations between testator, who does not characterise him as proposing to her a choice of what was in the will, or a one-third of the property as stated in the articles."

The defendant's counsel admitted in argument, "that the husband executed an article, I cannot deny; for I cannot deny what the will says." The decree was affirmed.

In 1837, the case of *Peyton* v. *McDermott*, 1 Drury and Walsh, 189, was decided by Lord Chancellor Plunkett. It was attempted to set up marriage articles executed in 1765. The Chancellor says: "I find possession going along with these articles. Again, I have strong evidence under the will of H. O'Rorke (the settlor) of the existence of these articles, as by a reference to them, the otherwise the apparent obscurity and confusion in that will and its limitations are explained and rendered plain." This was a very peculiar case in its facts.

The case of *Sadlier* v. *Biggs*, decided in Ireland in 1847, 10 Irish Eq. Reports, 522, enters very fully into the law on this head. It came before the House of Lords in 1853, 4 H. L. 435. A memorial signed only by grantee was recorded in 1746. For one hundred years possession had gone in accordance with the facts it recited. The question was whether the original lease, of which it professed to be a memorial, contained a clause for perpetual renewal on the dropping of lives. Many renewals had been made under it from time to time. Proceedings had been taken to enforce a renewal in 1799, and a renewal obtained.

Lord St. Leonard says: "It has been made a great question in reference to the memorial, which is signed only by the party who takes the interest, whether that of itself by its own force shall be considered as binding the estate of the grantor? That is a totally different question from that which is now before your lordships, because here the question is, whether or not the memorial can be considered as secondary evidence of the contents of the instrument of 1746, and considering the length and nature of the deeds by which it has been recognized, and considering the statute itself under which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind too that of course every memorial is signed by the person who takes the interest, because it is he, and not the grantor, who wants the protection of the register, I certainly am of opinion, and I think the authorities will not impeach that opinion, that this memorial is good secondary evidence of the contents of the deed of 1746, it being proved upon search, that the deed has actually been lost."

After noticing the formal proof required by the Registry Act, he continues; "Then the question is, the deed being lost and the possession having gone for a century, according to that deed, whether or not that memorial is secondary evidence of its contents. I confess I should be ashamed of the law of England, if such evidence as that could not be received from necessity as secondary evidence."

In *Doe Loscombe* v. *Clifford*, 2 C. & K., 452, Alderson, B., rejected the memorial as any secondary evidence. He says: "The memorial is only evidence against the persons who register. I think that if there is no clause in the act of parliament, making the memorial evidence, it is only evidence against the persons registering, and those who claim under them." See also *Wollaston* v. *Hakewill*, 3 M. & G., 297.

In Buller N. P. 254, it is said, "When possession has gone along with a deed for many years, (the original being lost or destroyed,) an old copy or abstract may be given in evidence without being proved to be true, because in such a case it may be impossible to give better evidence."

Lord Redesdale says, in *Bullen* v. *Michel*, 4 Dow., 325, "When a record is lost from accidental injuries, an inference is always drawn from the secondary evidence of other circumstances, from which a jury is called upon to presume that of which no direct evidence can be shewn."

In Taylor on Evidence, vol. 1., 362, it is said: "On one or two occasions the memorial or even an examined copy of the registry has been received as secondary evidence of the contents of an indenture, not only as against parties to the deed who have had no part in registering it, but also as against third persons; but in all these cases the evidence has been admitted under special circumstances, as for instance, where parties have been acting for a long period in obedience to the provisions of the supposed instrument, or where the deed has been recited or referred to in other documents admissable in the cause."

I am not aware that our Canadian courts have pronounced any opinion supporting the plaintiff's proposition, or at all at variance from the rule to be deduced from the authorities above referred to.

The solitary fact that fifty years ago a memorial appears duly registered by Gough, the grantee, apparantely proved by a witness as referring to a deed, which he swears he saw executed by the grantor, shews to us that Gough then apparently asserted title to these premises. The land is not in any remote situation, but in York township, close to the capital of Upper Canada. Had the evidence shewn that possession was taken within any reasonable time after, and that Gough and his descendants acted as the owners of land in apparent accordance with the title as-

serted in the Registry Office, and to the knowledge of the grantor, who allowed long years to elapse without objection, the strong presumption might be raised that the title was as the memorial asserts. The conclusion drawn by Pigot, C. B., in *Scully* v. *Scully*, would be applicable: "I think the inference is so cogent as to be almost irresistible that the possession of the land was influenced by a contract corresponding in import with that contained in the articles of which the document purports to be a memorial."

But when we find the Gough family abstaining for half a century from doing any act to gain possession of valuable land, and late in 1859, for the first time, bringing ejectment on a title said to be acquired in 1807, the inference to my mind at least "is so cogent as to be almost irresistible," that the claim is utterly lacking in all those evidences of good faith, and substantial right required by courts of justice in the formal proof of title to landed property.

A long undisturbed possession by the Goughs to the knowledge of the alleged grantors, who thus acquiesced in the long enjoyment of this estate by another, naturally suggests the presumption that such possession is of right. If we found the additional fact that the possessor affected to be the absolute owner, as by conveying to another in fee, &c., &c., it would heighten the presumption.

Our minds are first led to the belief that there was a right for all this, and then we are led on to infer from all the circumstances that the right was as is set forth in a memorial publicly placed on record with all statutable requirements, as a formal assertion of title by the grantee. We thus are led to believe that the long undisturbed possession and acts of ownership were based on this foundation of right.

Such a conclusion strikes my mind as analogous to that class of cases in which inferences are drawn from the silence of persons who listen without objection or dissent to the assertions of title by another derived from them, and who afterwards permit such other to obtain possession, and use the property so claimed for years without objection.

In this way the facts all combine to make up evidence directly affecting the alleged grantor, and making the presumption convincing that the claim is as the grantee asserts.

My opinion is that the plaintiff wholly failed to make out any case for a jury—that his evidence only proves that his ancestor fifty years ago asserted a claim to this land by his own written declaration and the oath of a witness in the registry office, that he never pursued his alleged right—and that it would be contrary to all authority, and tending to established a most dangerous precedent if such evidence be held sufficient to give title to an estate.

I think the nonsuit was right. In the view I have taken, it is unnecessary to notice at length the further strange feature in the case, that the Barrett family seemed to have claimed the land for many years, and that Montgomery states that he received a deed from young Barrett, purporting to be from T. B. Gough to his mother, which deed was not produced or accounted for.

The evidence (in a case of *Fields* v. *Livingstone*, 17 U.C. C.P. 15) to support a conveyance from a sheriff under execution to one McCrea, was as follows:—Searches for the deed, which the Court held sufficient; proof of the *fi. fa.* against lands; the receipts thereon endorsed by sheriff 6th December, 1823; memorandum attached thereto in the sheriff's handwriting signed by him, "Lot 17, Con. 1, Harwich, sold at sheriff's sale 11th December, 1824, to William McCrea, for £125, sheriff's fees paid by William McCrea;" the *Gazette*, and publication therein dated 9th December, 1823, reciting a seizure of the land by the sheriff and notice of sale for *11th December then next;* a memorial signed by the grantee, produced by the registrar, registered 17th December, 1820, purporting to be of a conveyance by the sheriff dated 16th December, 1830, in consideration of £125 paid him by McCrea, whereby he granted the land to McCrea, and all the interests of the execution debtor therein; it was therein stated that the deed was witnessed by two witnesses, gentlemen, residents of the Town of Sandwich. This memorial was signed by the *grantee*, in presence of but one witness. It was also proved that the execution debtor died in 1824 and under an ejectment suit his widow was turned out of possession in 1825 by the deputy sheriff, and possession given to McCrea. The material objections on the question of evidence were, that there was no sufficient secondary evidence, that the memorial signed by one witness only was void as such under the Registry Act, that it bore date 20th December, 1830, was registered 17th December, 1830, and the affidavit of execution appeared to have been made 22nd December, 1830.

The following is part of the language of the Court on giving judgment:

"Are the facts, then, in the present case consistent, and more consistent with the fact of the

sheriff having made a deed to McCrea, the purchaser, than with the fact that he did not make one? The sheriff was commanded by process to seil the land. He advertised it for sale, and *received* £125 from McCrea, and, as appears by the sheriff's memorandum, which is good evidence, because it is an entry in the usual course of business, and against interest, he received this money as the price of this particular lot which McCrea had purchased. It was the sheriff's duty also to have made a deed. Admittedly, however, he did not make it for several years after the sale. A memorial, or a document professing to be a memorial, was executed in December, 1830, by the grantee, of what is alleged to have been this particular deed, and it was registered at that time. Possession was not taken under this supposed deed until about eighteen years after the making of it, and about twenty-three years after the actual sale; but possession has been held for the last eighteen years under this alleged deed, and the defendant now maintains his possession by virtue of it."

The Court held that there was sufficient evidence of the conveyance, but they relied on the other facts beyond the memorial, and it is probable that if they had been wanting the evidence would not have sufficed. It is to be remarked that the subscribing witnesses were not called, nor any reason given why they were not.

There would seem to be some danger in allowing mere length of possession and dealing with the property to be sufficient corroborative evidence whereon to adopt as evidence of a conveyance in fee simple absolute a memorial executed by a grantee. Take the case of a conveyance to such grantee for life only, or of a grant to uses to the use of some person in fee, but with a shifting use over, or of a devise in fee with an executory devise over on the happening of an event, and a memorial thereof executed by the grantee, referring to an instrument in fee simple absolute. Here the life tenant, or first taker, might have destroyed the instrument (to the custody of which he is entitled), and have conveyed in fee simple absolute, and the property have passed in fee *bonâ fide* through various hands during the life of tenant for life, or before the event whereon the shifting use or executory devise over is to take effect, for fifty years or more, and the possession and dealing with the property have thus been consistent with right of possession, and with the conveyance in fee as set out in the memorial. The reversioner, or other person entitled, or his heirs, are not supposed to enquire till their right accrues, and when it does they have to contend against evidence offered of the fraudulent memorial and the possession and dealing said to be consistently with it. Again, those entitled on the death of the life tenant, or on the event happening whereon their right accrued might have been under disability. It may be urged that it may always be assumed that a false memorial as above suggested could not be registered, on the ground that the registrar, as a public officer, would be presumed not to register the instrument if incorrect. It is known, however, that practically this assumption affords no safeguard, that as a general rule the registrars are quite incapable of placing a construction on an obscure will, or on any but the most common instruments, and are unwilling to incur the risk of declining to register on the ground of a supposed variance. Moreover, until the recent Registry Act, it was not necessary to set out in the memorial the quantity of estate, *i.e.*, the interest, conveyed, and therefore it was held that a memorial varying from the original in that respect, and so registered, was not defectively registered (*Lessee McDonald* v. *Murphy*, 2 Fox & Smith, 304 *in notis*; *Mill* v. *Hill*, 3 H. L. Ca. 828; *Wyatt* v. *Barwell*, 19 Ves. 435). The evidence therefore afforded by the mere fact of registry is, it may perhaps be urged, not so strong in regard to those particulars which need not be set forth as to those which must.

The cases when examined hardly go the length of shewing that mere length of possession, though for considerable time under an alleged grant in fee coupled with a memorial executed by the grantee, is sufficient evidence. There are either other facts which lead to the belief of, or are confirmatory of the instrument; or, if mere length of possession alone has been considered sufficient, it has been in cases other than on a question of whether the conveyance was in fee simple absolute to the grantee, and where the possession had was quite inconsistent with the instrument being otherwise than as set out in the memorial. I have pointed out that there may have been possession for fifty years or more under a conveyance or will alleged by the grantee or devisee to have been in fee, which possession was quite consistent with a lesser or conditional estate having in fact passed.

If mere length of possession in those claiming under the memorial executed by a grantee is to be the only circumstance corroborative of the memorial, as evidence of a conveyance in fee as therein stated, the question at once arises what length of possession is required. Considering the cases above alluded to of a life estate only being in fact granted, and of limitations by way of shifting use, or by executory devise, and of disabilities, it may be said that the only safe guide would be that length of possession which the courts have established as that from which a title must be shewn to a purchaser, namely, sixty years. That rule is based on grounds applicable to the present question. The ordinary duration of human life is assumed to be sixty years: taking, therefore, as the root of title a conveyance sixty years old, from some one shewn to have been then in possession, but whose title is not otherwise shewn, and conveyances thence in a proper chain of title to the vendor, there is good reason to believe he has good title. It is fair to assume the grantor in the first conveyance was of age when he conveyed: taking him to be then only twenty-one, and to have died at the age of sixty, the right of those in remainder or reversion then accrued; twenty years would in ordinary circumstances bar them, and thus the sixty years possession would confer a title, but only barely so.

It will be observed, however, that after all the safety of the purchaser of the title under these circumstances would rest more on the Statute of Limitations, than on the presumption that the conveyance is in fee simple absolute.

As between vendor and purchaser, and under the Act for Quieting Titles, stricter evidence is required than in ejectment, which is not final in its consequences, and in which the more temporary right to possession as between only the claimant and the defendant is in issue. It is evident that though the admission of a grantor by a memorial, or otherwise, that he conveyed in fee, may be evidence whereon a claimant in ejectment may establish mere *prima facie* right to possession, it is quite consistent with such admission that the conveyance is subject to be defeated on payment of money, by a shifting use, or the like matters which in ejectment the claimant is not required to negative, but of which a purchaser must have evidence. As between vendor and purchaser, and under the Act for Quieting Titles, the following remarks from Hubback on Succession pt. 1, ch. 3, p. 62, apply:—"In weighing the insufficiency of evidence, the practice of conveyancers is more strict; in determining its admissibility, more lax than that of Courts of Justice. The former seems to be an effect of the difference in the position of the parties; the latter, of the difference in the powers and functions of those by whom the evidence is judged. The purchaser in *bona fide* transactions, by the mere possession of his purchase money, shews and offers to pass an indisputable to it; whilst the title to land not appearing by possession, he cannot have the same assurance of the vendor's right to the equivalent bargained for. This much seems to be settled; that higher evidence is necessary than such as would merely prevail in ejectment. There are erroneous judgments upon defective or unsound evidence which may be cured by another ejectment; but if the doubts upon a title should, after completion ripen into defects, the purchaser may find it impossible to regain the position which he held before the contract. What Lord Eldon observed of legitimacy seems to be true of any other matter of fact expressly or impliedly alleged on the abstract; that a jury may collect the fact from circumstances, and yet the Court would not compel a purchaser to take the title merely because there was such verdict. The Court will weigh whether the doubt is so reasonable and fair that the property is left on his hands not marketable. The rule applies generally to presumptions of fact, which conveyancers are slower of raising than Courts of Justice. Thus a seven years' absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient as between vendor and purchaser. Besides the greater difficulty of retracing an erroneous step, there exists another cause of difference from forensic practice, the more extensive office of conveyancer's evidence, which is to afford reasonable satisfaction to the purchaser, that the title is good against all the world, and not merely like that of evidence in litigation, that it is sufficient to prevail against certain contending parties. In this particular, a vendor's evidence resembles that of a claimant of peerage: it is not to

shew a better or preferable title relatively to any other, but to prove that the title is certainly and exclusively in the party asserting it. Again, conveyancers evidence is for the most part necessarily *ex parte;* a vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disapprove facts, which, if he were a party litigant, it would be the business of his opponent to negative or establish. The heir in ejectment, either by or against him, or as a party to a suit in equity, need not adduce proof that his ancestor died intestate, it resting with his adversary to prove the affirmative fact of a will, if there is one."

The execution of a memorial which is receivable in evidence need not be proved when more than thirty years old (*Doe Maclem* v. *Turnbull*, 5 U. C. Q. B. 129), and it would seem that where a foundation is laid by proper search or otherwise for the admission of the contents of a memorial as evidence, and when requisite, sufficient corroborating circumstances or privity shewn, that such memorial, though not thirty years old, produced from the registry office, need not be proved; and that a copy certified by the registrar as such is also admissible without proof of the execution of the original, or of the instrument to which the original relates (*Marvin* v. *Hales*, 6 U. C. C. P. 211; *Lynch* v. *O'Hara*, 6 U. C. C. P. 267; Buller N. P. 255; 1 Taylor Ev. 862; see also *Doe d. Prince* v. *Girty*, 9 U. C. Q. B. 41. Con. Stat. Can. ch. 80; 29 Vic. ch. 24, s. 19.)

It is difficult to gather any very definite principle from the cases. So far as the ordinary principles of evidence apply, it appears difficult to escape from the conclusion of Alderson, B., in *Loscombe v. Clifford*, that "if there is no clause in the Act of Parliament making the memorial evidence, it is only evidence against the persons registering and those who claim under them;" and indeed this seems to be assumed as the rule in Taylor on Evidence, sec. 389, p. 377, 3rd ed., where the author observes "That in all cases where the evidence has been admitted against third persons, it has been under some special circumstances (drawing no distinction between such memorials as have been executed by the grantor and those which have been executed by the grantee). Perhaps, however, this may not be the rule when the memorial is executed by the grantor, and is in reality against his interest, and not as in the case of *Jones* v. *Todd*, where the grantor was in fact getting rid of a *damnosa hæreditas*, and the memorial was sought to be used against the grantee; though in strictness to render the evidence admissable on this ground, it would of course be essential that the grantor should be proved to be dead at the time the evidence is tendered. When the memorial is executed by the grantee it seems admitted on all hands, (and the same rule must apply, where though executed by the grantor, it is not in reality against his interest,) that it is not necessarily, or in all cases, secondary evidence. And here the distinction must be borne in mind between the admissibility, and the weight of the evidence. It seems in the cases, on which such evidence has been admitted, that the memorials have been rather treated as part of a chain of circumstances given in evidence towards proof of the alleged deed, than as secondary evidence in themselves; and the decisions in effect appear to be, that from the existence of such a memorial coupled with the other proof, the existence of such a deed may be presumed; in other words, that there may be circumstantial secondary evidence, and that such a memorial may form a link.

The remarks of Lord Eldon in *Scully* v. *Scully*, are in accordance with this view—"The question, he observes, in every case of this sort is, whether all the testimony taken together, offered as secondary evidence, is or is not sufficient to enable you to say, that as you have not the writing before you, you will act upon it as if you had it before you, and with an absolute certainty of what that writing contained." And the observations of Lord St. Leonards in *Sadlier* v. *Briggs*, point in the same direction. It may be observed that most, if not all of the English cases in which the memorials have been admitted, have been cases in equity, in which the Court were judges, both of law and fact, of the admissibility and weight of the evidence. Viewed in this light, the effect of a memorial, and the attendant circumstances become a question rather of fact than of law, and its probative effect in each case will depend, to use the words of Lord Eldon, upon whether upon all the facts taken together the Court, or the jury under the direction of the Court, can say

they will act upon the alleged writing as if they had it before them. And this would seem not only to be the only way of reconciling the cases, but the only logical way in which such a memorial can be held to have any probative effect whatever. It is certainly not very logical to say, that the question, whether a memorial is in itself secondary evidence, should depend upon whether from other circumstances, it appears probable that the result of such evidence is true, while by treating it as merely a link in a chain of circumstances, this apparent difficulty is obviated.

Bearing in mind the distinction above referred to as regards the evidence requisite in ejectment, and between vendor and purchaser, or under the Act for Quieting Titles, and that in the two latter cases negative evidence beyond the memorial is requisite to displace existence of matters which is not set forth in it, and of which therefore it affords no evidence, the result on the whole appears to be —

1st. That a memorial, is undoubtedly, secondary, if not primary evidence against all persons claiming under the persons registering.

2nd. That when executed by the grantor, and really against his interest, it is probably evidence against third persons.

3rd. That when executed by the grantee or grantor, when not against the interest of the party executing it, it is not in itself secondary evidence, but may, with other circumstances, form a link in a chain of circumstantial evidence, proving as secondary evidence, the existence of a deed. A. L.

LAW SCHOLARSHIP EXAMINATIONS.

To correct any mistake or misapprehension on this subject, we may state shortly that these examinations have hitherto been held on the second day of Michaelmas Term in each year, and any change in this respect, will doubtless be published when made. A week's notice should, for the convenience of the examiners, &c, be given to the librarian, previous to the commencement of the Term by all those who intend presenting themselves for examination. Books to be read for these examinations are those which will be found advertised on the cover of this journal; but what is meant by the first, second, third, and fourth year students, as the case may be. will be seen by a rule passed by the Benchers in Convocation in February, 1865, which reads thus:—

"All students who have been, or who shall hereafter be admitted upon the books of the Society in Easter or Trinity Terms in each year may present themselves for examination for scholarships as follows, that is to say: For the scholarship for first year students, in the Michaelmas Term of their second year. For the scholarship for second year students, in the Michaelmas Team of their third year; and for the scholarships for third and fourth year students, one or both, in the Michaelmas Term of their fourth year, provided always, that nothing herein contained shall authorize or permit any student to present himself a second time for examination for the same scholarship."

It is also to be noted, that graduates of a University are looked upon as students of two years standing, and must make their calculations accordingly. The winter lectures for the benefit of all those who choose to take advantage of them, commence on the first Monday in November, and continue until the end of April.

Chancery practitioners in Toronto would take it as a favour if those who have such matters under their control, would so arrange, that stamps could be obtained in that department of the Registrar's office which is situated somewhat as Mahomet's coffin is said to have been. The inconvenience of having to go from the top of the west wing to the bottom of the centre wing of Osgoode Hall, for a stamp, and then back again, might be endured without complaining, if it were a necessary evil, but this we are informed is not the case, and until a short time ago stamps were kept by Mr. Holmested. We thoroughly appreciate the benefit and pleasure of a fair proportion of muscular exercise, as a relief from the severe mental labour incident to the profession, but it may be doubted whether running up and down stairs is the pleasantest form to take such exercise.

The following is a summary of business in the Court of Queen's Bench during Michaelmas Term last:

Rules Nisi moved	69
Rules Nisi refused on mot. or af. hearing parties	14
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JUDGMENTS.

ERROR AND APPEAL.

Present — Draper, C. J.; The Chancellor; Richards, C.J., C.P.; Spragge, V. C.; Hagarty, J.; Morrison, J.; Adam Wilson, J.; Mowat, V. C.; J. Wilson, J.

Thursday, January 2, 1868.

Mulholland v. *Williamson.*—Decree reversed.

Mason v. *Agricultural Ins. Co.*—Appeal from Common Pleas allowed.

Harrold v. *County of Simcoe.*—Appeal from Common Pleas dismissed with costs, the Chancellor dissenting.

McBeth v. *Smart.*—Appeal allowed. Appellant declared to be entitled to fund in Court, with costs, subject to bill in court below, dismissed with costs.

Martin v. *Martin.*—Argued, and stands for judgment

Friday, January 3, 1868.

Darling v. *Hitchcock.*—Appeal from Queen's Bench, heard and stands for judgment.

Bank of Upper Canada v. *Wallace.*—Appeal from Chancery heard and stands for judgment.

Saturday, January 4, 1868.

Stephens v. *Simpson.*—Appeal from Chancery, heard and stands for judgment.

Tylee v. *Cameron*—*Tylee* v. *Strachan.*—Appeals from Chancery dismissed with costs, appellant not appearing.

Kirkpatrick v. *Lyster* —Appeal from Chancery, heard and stands for judgment.

Monday, 6th January, 1868.

Newton v. *Ontario Bank* —Appeal from Chancery heard and stands for judgment.

QUEEN'S BENCH.

Present—Draper, C. J.; Hagarty, J.; Morrison, J.

December 23, 1867.

Cloy v. *Jacques* —Appeal from County Court of County of Lincoln. Appeal dismissed with costs.

Taylor v. *McEwen, Sheriff* — Appeal from County Court of the County of Essex. Appeal allowed. Rule to be absolute in the Court below to reduce the verdict to the sum of $25.

Re Grand and the Corporation of Guelph.—Rule discharged with costs.

Harrison v. *Whimster.*—Rule absolute for new trial, with leave to plaintiff to fyle amended declaration, and defendant to plead thereto. If plaintiff gets a second verdict he is not to tax costs of first trial. If defendant gets a verdict he is to be allowed costs of both sides.

Buchan v *Smith.*—Appeal from the County Court of the County of Wellington. Appeal dismissed with costs.

Cook v. *Murphy.*—Rule discharged.

Crewson v. *Grand Trunk Railway Company.*—Rule absolute to enter nonsuit.

Fairbairn v. *Hilliard.*—Appeal from County Court of County of York. Appeal allowed. New trial without costs in court below.

Brown v. *Cline.*—Appeal from County Court of Norfolk. Appeal allowed.

Gilkison v. *Elliot.*—Demurrer. Judgment for demandant. Leave to apply to amend granted.

Corporation of the Township of Burleigh v. *Hales.*—Rule *nisi*, to set aside verdict, etc. Rule discharged.

Ostrom v. *Kincaide.*—Rule discharged.

Smith v. *Royal Insurance Company.*—Judgment for plaintiff on demurrer.

Craske v. *Huffman.*—Special case. Postea to plaintiff.

The Queen v. *Mortsen.*—Rule to quash conviction discharged with costs.

McNalley v. *Church.*—Special case. Postea to defendant.

Smith v. *Smith.*—Rule discharged.

Royal Canadian Bank v. *Brown et al.*—Rule absolute for new trial, without costs. Leave to appeal asked and granted.

Northern Railway of Canada v. *Lister.*—Rule discharged. Leave to appeal refused.

Campbell v. *The Counties of York and Peel.*—Rule discharged. Leave to appeal asked and granted.

In the matter of James Moffatt and the Sheriff of County of York.—Rule discharged with costs.

Trust and Loan Company v. *Covert & Ruttan.*—Judgment for defendant on demurrer..

Tolman, Executors v. *The Mutual Fire Insurance Company of Clinton.*—Judgment for defendant on demurrer.

The Queen v. *Hull.*—Rule absolute on payment of costs.

McMillan v. *McDonell* —Rule absolute to enter verdict for plaintiffs.

Re Gibb v. *Corporation of Township of Moore.*—Rule discharged with costs.

In the matter of the Queen and Murray, appellant, and W. G. Leonard, respondent.—Rule absolute without costs.

McGillivray v. *Millon.* — Rule absolute for non-suit.

The Queen v. *John Patterson.*—Rule discharged.

Plant, Administratrix, v. *the G. T. R. Co.*—Rule absolute for nonsuit.

COMMON PLEAS.

Present—Richards, C J., C.P.; Adam Wilson, J.; John Wilson, J.

December 23, 1867.

Campbell v. *The Grand Western Railway Co.*—Stands.

Lyster v. *O'Lough.*—Postea to plaintiff.

Brady v. *Western Assurance Company.*—Rule discharged.

Eaton v. *Shannon.*—Appeal dismissed with costs.

The Queen v. *McDonald*—Conviction affirmed, and judgment to be given thereon at the next sitting of Oyer and Terminer, in the County of Brant.

Murray v. *Dawson.*—Demurrer. Judgment for the defendant on the exceptions to the declaration.

Paton v. *Newberry.*—New trial without costs.

Stock v. *Shewan.*—New trial to plaintiff on payment of costs to defendant.

Chadsey v. *Ranson.*—Rule discharged.

Meyers v. *Winter.*—Rule discharged, with leave to defendant to amend particulars now.

Doyle v. *Eccles.*—Ordered that, upon defendant delivering up to plaintiff the books and papers in dispute, if plaintiff shall choose to accept them, the verdict be reduced to one shilling; the defendant to pay the costs of all proceedings to be taxed as Superior Court costs; but may proceed on conditions specified in rule.

In re Parr v. *Spencer et al.*—Appeal. Appeal allowed without costs, and case referred back to the Judge for further consideration.

McMillan v. *Jelly.*—Rule discharged.

Killington v. *Herring.*—Rule discharged.

Sheely v. *McCrae.*—Rule discharged.

Williamson v. *G. T. R. Co.*—Judgment for defendants on second count. Leave to appeal asked for and granted.

Jay v. *Hartz.*—Judgment for defendant on demurrer to declaration, with leave to amend on payment of costs.

Koster v. *Holden*—Rule discharged. Leave to appeal applied for and refused.

Gore Bank v. *Tarbot.*—New trial on payment of costs.

Rowe v. *G. T. R. Co.*—No rule.

Fowler P. H. & B. R. Co.—No rule.

Saturday, December 28, 1867.

Campbell v. *G. W. R. Co.*—New trial on payment of costs, on condition of defendant paying £800 into Court, with leave to plaintiff to take that sum out of court without prejudice to her claim for damages *ultra* at another trial; defendants to have liberty to add a plea of such payment into Court; said sum and costs to be paid on or before first day of next term; in default, rule to be discharged.

Dixon v. *Farrell.*—Rule discharged.

Manning et al. v. *Thompson.*—Rule discharged. John Wilson, J, dissenting.

Martin v. *Brumell.*—New trial. Costs to abide event.

The Queen v. *Mills.*—Special case. Conviction confirmed.

Todd v. *Provincial Insurance Co.*—New trial; costs to abide event. Judgment not finally given. Counsel to be consulted as to whether they wish decision as to effect of warehouse receipt.

Hesketh v. *Ward.*—Rule absolute to discharge defendant from custody without costs. Adam Wilson, J, dissenting.

SELECTION.

FRENCH CODES, AND ENGLISH DIGESTS.

Now that a Royal Commission is about to work,* the time seems appropriate for stating shortly how the French have *codified*, and how the English have at different intervals, and with varying success, *digested* their laws.

The French operation began with the abolition of feudalities at the earliest stage of Revolution, on the 4th of April, 1789. Next came the extinction of the law of primogeniture, and the adoption of natural equity and presumed affection as the basis for succession. These changes were effected under the superintendence of Merlin, well known to us as the author of the *Rèpertoire* and of the *Questions de Droit.*

The ground being much cleared by these advances, it seemed to those in authority that the time had arrived for a wider undertaking, that of digesting and arranging all the Civil laws of France into one body, introducing also the required alterations, these last having been demanded chiefly by the conflict of local and provincial customs. To execute this great undertaking, Merlin was associated with a lawyer greater than himself, the celebrated Cambacères, afterwards one of the Consuls. These two men, Cambacéres and Merlin, were charged by the Assembly to prepare a sketch of the proposed classification. On the 11th of August, 1793, having performed the task assigned to them, they made their report to the Convention. It is stated that the work had fallen principally upon Cambacères. In the year 1794 that remarkable man published a separate report *sur le Code Civil*, the original, or at all events, the germ of the *Code Napolèon.* For ten years his labours in improving and maturing this production are said to have been incessant, Its merits and defects were discussed from time to time at no less than sixty sittings of the Convention. It was strongly opposed; the chief objection being, that it savoured too much of the practitioner; for Cambacères, though an advocate of improvement, was not an innovator. His project was referred to a committee, who lost themselves in the discussion of first principles, and in empty declamation. Much time was thus wasted; nor was the matter mended by the Council of 500, who ordered the judges of the Superior Courts to deliver their opinions. The judges obeyed, but, as might have been expected, their criticisms increased rather than diminished the existing perplexities; and the codification of the French law would have been postponed indefinitely, had not a strong hand at this period interposed.

After the battle of Marengo the First Consul issued a commission to examine the work of Cambacères, choosing for this purpose, without reference to political opinion, four lawyers of

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* A working staff is soon to be put in harness.

the highest reputation; Tronchet, the defender of Louis XVI.; Portalis, a philosophic priest of conservative leanings; and Maleville and Preameneu; all chosen, not only for their learning and experience, but for their judgment and moderation. These were the Rèdacteurs of the *Code Civil*, of which, however, it is always to be remembered that Cambacères was the parent. The revised version, as corrected by the Rédacteurs, and as criticised by the legal profession (among whom it had been circulated,) was submitted formally to the *Conseil d' Etat*, whose committee of legislation framed a new draft from the materials before them. The new draft, thus prepared and thus matured, was discussed article by article in the *Conseil d' Etat*; the First Consul, as M. Theirs informs us, descending from his war horse and not only attending every meeting, but astonishing "the whole world by the novelty and profundity of his suggestions."

In this way, after having received the sanction of the legislative body, a Code of Civil Law was, on the 3rd of March, 1803, presented to the French nation, and it has governed them ever since. The Code of Procedure, principally the work of Cambacéres, appeared in 1806; the Code of Commerce in 1807; the *Code Pénal*, the *Code d' Instruction Criminelle*, and the *Code Forestier* at subsequent periods. These, the result of twenty years' thought and labour, form now the pocket volume known as the *Code Napoléon*. We have said enough to show that it did not originate with the extraordinary man whose name it bears, although it became his glory and his chief boast in after life that he had given it consummation.

The object of the preceding sketch is to show how cautiously the French went to work in framing their code, and how signal is the delusion of those (and they are many) who fancy that it was dictated by Napoleon. The radical alterations were not great. To be satisfied of this we have only to examine the old French treatises; but it seems enough to cite the notorious fact that more than three fourths of the *Code Civil* are extracted from or built upon Pothier.

To the power of seeing everything beforehand the faculty of legislating *ab ante*, the gift of prescienee in fact, the jurists employed by Napolean made no pretension; "thanks," says the Baron de Locré (their editor), "to that admirable good sense which pervades their whole performance.

To turn from France to England, we find that the illustrious Bacon had long meditated what he called "a particular digest or compilement of the laws of his own country." In his latter day of disgrace and depression he actually commenced this arduous undertaking; but he was obliged "to lay it aside" from inability "to muster his pen and forces," and from the want of hands to help him in a work which he truly termed one peculiarly "of assistance." Caution and moderation were the characteristics of his scheme, and order was the object of it. He suggested no startling or abstract innovations. His biographer, Lord Campbell, commends the prudence and sagacity which forbade his attempting a code. What Bacon proposed was "to compile a method and digest of the King's laws;" and the argument he addressed to the regal pedant was, that "great good would come from bringing cases to a text law, and setting them down in method and by titles." He knew that this operation, as it advanced, would necessarily beget substantive improvements; but these, he wisely held, must be left to the legislature. We cannot otherwise understand him, when he says that those employed "should not be with a precedent power to conclude, but only to prepare, and propound to Parliament." And we are confirmed in this construction by the report of Lord Colchester, who as chairman of the Common's committee in 1796, describing the overture of Bacon to King James, stated that its end was "to prepare a digested result for Parliamentary consideration." The immediate effect, however, would have been to unfold the law as it stood, so that all should not only obey, but, by an exercise of reasonable intelligence, understand it.

The formidable task which proved too much for Bacon, was accomplished about a century afterwards (at the suggestion apparently of Burnet), by an obscure and unassisted hard-working barrister of Lincoln's Inn; for such, we believe, was Lord Chief Baron Comyn, when he compiled in Norman French the greater part, if not the whole, of his well known "Digest of the Laws of England;" embracing our entire jurisprudence, civil, criminal, ecclesiastical, and constitutional. This elaborate compilation, though prepared so early, did not see the light till 1762.* more than twenty years after the learned judge's death, and probably not less than forty after the date of the original composition, which, moreover, was published under the disadvantage of a translation by unknown editors, who seem to have been strangers to the author. Much of the law contained in this work had of course become stale. Its arrangement, too, was not always happy. The book as a whole was repulsive; but its matter was good; its law was safe. Its propositions were terse, and its references convenient and copious. In a word, it saved the drudgery of constantly hunting up old and scattered authorities. We therefore cannot wonder that the profession received the Chief Baron's performance as a boon, for it is certain that they still look back upon the donor with gratitude and reverence

If success, so signal and so marvellous, attended the efforts of a single individual in delineating, unaided, the entire body of English jurisprudence, what ought we reasonably to expect from the labours of a Royal Commission engaged in a similar operation—remembering,

*Comyn flourished as a reporter in the reigns of King Wm., Queen Anne, and the first two Georges. His reports began in 1695.

ae we must, that the compilation of Comyn has become a thing of the past, and that—as Sir James Wilde says—"the structure of our existing law has been raised chiefly within the last century and a half." It is rumoured that Lord Cranworth and his colleagues contemplate the nomination of a phalanx of jurists to work the Commission; an operative staff, composed, not of Ulpians or Trabonians, but of industrious lawyers, reasonably skilled in their profession, reasonably addicted to labour, and—what is not less material—reasonably trained to the austerities of legal composition. These, acting in concert, but with a distribution of duty appropriate to each, will be subject to the direction, supervision, and correction of a board, having in its number some of the first lawyers that England can produce. We feel quite confident that a work prepared under such auspices *must* succeed; and if we had any doubts on the subject. the admirable report already issued would have dispelled them. This Commission will, in fact, realize the dream of Bacon. It will, as he proposed, frame a digest—not a code; although a code may be its fruit when the digest is complete.

In the posthumous continuation of Austin's Jurisprudence (ably edited by his lamented widow, who has recently followed her distinguished husband), what he contemplated and advocated at the outset was "merely a re-expression of existing law, with apt divisions and sub-divisions;" in fact neither more nor less than a digest, which, however, he thinks "will prepare the way for a code." He proposes to extend the work to Scotland and to Ireland. To overlook these countries, he conceives, would be a slight upon both. And we quite agree.

A systematic digest drawn up after profound deliberation, though not binding, would be of instant value to the practising lawyer, and even to the judges. It would give confidence to legal opinions, and prevent litigation in many cases where counsel, after balancing discordant authorities, advise dubiously a suit, or a defence.

The digest would address itself to all classes. It might even be sold at a moderate profit, which would contribute to defray the expense of the commission; a consideration not undeserving of attention in this age of economy. The publication would be by instalments, to give evidence of progress and quality; each branch of the law being easily capable of severance from the rest. Every professional person, and we incline to think, a large portion of the educated community, would desire to possess themselves of an exposition, revised, corrected and sanctioned by the first legal intellects of the country; setting forth, in a readable form, the rights and liabilities of the people, and enabling them to comprehend that which, whether they comprehend or not, they are bound to obey.

We have said nothing of Cruise's admirable digest, because it is confined to real property. We have also been silent as to the *Law Journal* digest, which, commencing in 1820, and continued quinquennially, has proved of the greatest use to the profession. Its birth put an end to all renewals of Comyn. It will be of the greatest service to the Royal Commission.

Three months before his death, Lord Lyndhurst, in a letter to the writer of this article (written in his Lordship's beautiful hand), says, "I have never publicly expressed an opinion upon the subject of codification; but I think the utmost that can be done is to form a digest."

Lincoln's Inn, October, 1867.

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter to Practice Court and Chambers.*)

Bell v. Cuff.

Ejectment—Staying proceedings until costs of former actions paid—Same "cause of action"—Vexatious suits.

Plaintiff in ejectment claimed to recover in a second action the same land as he had sued for in a former action, and under a forfeiture in the same lease, but the forfeiture on which the second action was brought was a new forfeiture, and had been incurred long subsequent to the obtaining judgment in the prior action. On an application by the defendant to stay proceedings until the plaintiff should pay the costs of the first judgment and execution,

Held, That as the second action was not brought for the same cause as the first the application must be refused.

Quære, If it were shewn that the question involved in the second suit had been involved in and could have been tried by the first, and that the second suit was brought vexatiously.

[Chambers, October 7, 1867.]

Durand applied to stay proceedings in this action until the plaintiff should pay the costs of two judgments and executions in ejectment commenced by him in 1866, against the defendant and his then tenant for the same cause of action substantially as the present action; and why, if such costs were not paid in one month, the defendant should not be at liberty to enter judgment of *non pros.* in this action.

Osler shewed cause. The fact of the plaintiff having sued the defendant in the former action is not denied, nor that it was brought to recover the same land as is now sued for, upon an alleged forfeiture of the same lease now set out in the notice of claim; but this action is not brought for the same forfeiture for which the prior action was brought, but for a further and fresh forfeiture incurred long subsequent to the obtaining judgment in the said prior action, and the defendant well knows that to be the case.

This action is not founded on the same title as the one previously in question. *Doe Henry* v. *Gustard*, 4 M. & G. 987, shows that a new action may be brought for a new forfeiture, and the action will not be stayed although a former action may be still pending upon the same title; and *Doe Bailey* v. *Bennett*, 9 Dowl. 1012. decides that it is a good answer by the plaintiff that he is not suing on the same title as in the previous action, and he need not state what that title is, and for these reasons the 76th section of the Ejectment Act does not apply.

Durand supported the application. The court will stay proceedings where the parties and the title are the same in both actions: Ch. Arch. Prac. 11 Ed. 1039—1041—1370.

Adam Wilson, J.—The principle which applies in such a case is to stay proceedings if the plaintiff is acting vexatiously by bringing a second action: *Short* v. *King*, Strange, 681; *Melchart* v. *Halsey*, 2 W. Bl. 744; *Danvers* v. *Morgan*, 17 C. B. 530; *Pashley* v. *Poole*, 3 D. & R. 53; *Faith* v. *Guppy*, 12 Jur. N. S. 1011; and therefore the court would not stay the second action where the plaintiff had to abandon his first suit by reason of a mistake which he amended in his new action: *Short* v. *King*; *Pashley* v. *Poole*, *ante*; nor would they stay the second suit where the verdict was obtained in the first one by fraud, and perjury: *Doe Kerr* v. *Thomas*, 2 B. & C. 622.

There is no general rule that a plaintiff is compelled to pay the costs of a first action before he is suffered to proceed with the second; *Pashley* v. *Poole*, 3 D. & R. 53; *Doe Kerr* v. *Thomas*, 2 B. & C. 622; *Danvers* v. *Morgan*, 17 C. B. 530; *Prowse* v. *Loxdale*, 3 B. & S. 896.

Some light is thrown also upon the law by the provision which the legislature has made for security for costs being given in such a case, and the 76th section of the Ejectment Act, which is very general in its language, I think should be read in connection with the 1st section of the 29 & 30 V. c. 42, which enacts that security for costs shall be given when the second suit is brought for the same cause as the first one.

Upon a consideration of the authorities, as this second action is not brought for the same cause as the former one was brought for, there is no ground for staying it until the costs of the former action have been paid.

It may be possible, if it were made to appear that the question involved in the present action was involved in and could have been tried in the first action, and that the present one is brought to harass and oppress the defendant, that relief might be given, for I do not think it would be exceeding the powers of the court to interfere in such a case, otherwise a plaintiff might have fifty such actions pending, or forty-nine judgments against him, and a fiftieth action pending in respect of a different alleged forfeiture, the trial of any one of which claims would have settled the rights between the parties, and yet he might forbear to try the question, and thus keep perpetually annoying the defendant with fresh actions and the defendant would have no redress.

I think the present application must be discharged, but I do not think it is a case for costs.

Summons discharged.

Brooke v. The Bank of Upper Canada.

Corporation—Forfeiture of bank charter—Effect on tenure of office by president and directors—Service of process.

Service of process was made upon A. as president of a bank. The last election of officers was in June, 1866, when A. was elected president for one year. No election of directors or president had taken place since then, and A. never in fact resigned his office as president. In September, 1866, the bank suspended specie payment, and before 60 days thereafter they assigned their property and assets to trustees, and from thence had ceased to do business as a bank. It was provided by the charter, amongst other things, that a suspension of specie payment for sixty days, or an excess of the debts of the bank by three times the paid up stock and deposits, &c., should operate as a forfeit of the charter, &c.

Held, 1. That the total annihilation of the bank was not contemplated by these provisions, and it does not follow from the loss of the charter that there must be a dissolution for all purposes.

2. That some formal process is necessary finally to determine and put an end to all the functions of a corporation.

3. That notwithstanding the suspension and assignment, the bank was still a corporate body, liable to have its property sold or administered for the satisfaction of debts.

4. That A. must still be looked upon as the president of the bank, and an application to set aside the service upon him was discharged with costs.

[Chambers, October 10, 1867.]

This was a summons to set aside the service of process made upon Mr. Allan, who was served as president of the Bank of Upper Canada, upon the ground that the bank having suspended specie payments for more than sixty days consecutively, a forfeiture of their charter had been created, and that there existed no such corporation as the defendants were represented to be, and that even if there were such a corporation, that Mr. Allan was not the president, or an officer of the bank.

It appeared from the affidavits filed that the last election of officers was in June, 1866, when Mr. Allan was elected president for one year, and that the bank suspended specie payments in September, 1866; and before sixty days therefrom, the bank (on the 12th November, 1866) assigned, with the consent of the shareholders, all their property and assets to trustees, and had ceased from that period to do any business as a bank. That no meeting was held in June, 1867, for the election of directors and president, and that Mr. Allan had never in fact resigned his office of president.

Maclennan shewed cause. He contended that the bank did exist in fact as a corporation, notwithstanding the forfeiture of the charter; that properly its corporate powers could not be determined, whether by suspension of specie payments or by the assignment of its assets, except by proceedings taken for that purpose, and that the officers last elected, and who had never resigned, must be considered to be the proper officers of the bank for service of process and other purposes. He referred to the act of incorporation, 19 & 20 V. c. 121, secs. 7, 8, 33, 35, 36; Grant on Banking, 462, 539; *Stewart* v. *Dunn*, 12 M. & W. 655; Grant on Corporations, 283, 295, 301, 305, 306, 309; Angell & Ames, on Corporations, sec. 777.

G. D. Boulton supported the application, and argued that the forfeiture of the charter, which, it was expressly declared by statute, should follow in the event of suspending specie payments, was in fact a dissolution, or was equivalent to a dissolution of the corporation; and, in such a case there could be no longer any officers of the corporation, for the corporation itself was utterly gone and determined, and the service itself was therefore irregular. *Slee* v. *Bloom*, 19 Johnston, 456; Kyd on Corporations, 447, 515; 1 Bl. Com. 500, 501; Angell & Ames on Corporations, sec. 779; 19 & 20 Vic. secs. 2, 7, 8, 32.

Adam Wilson, J.—By sec. 7 of the act, ten directors are to be elected annually at a general meeting of the shareholders, to be held annually on the 25th of June, and the directors elected shall be capable of serving as directors for the ensuing twelve months; and at their first meet-

ing after such election the directors shall choose out of their number a president and vice-president, who shall hold their offices during the same period.

By section 8, if an election of directors be not made on the day fixed, the corporation shall not be taken or deemed to be dissolved, but such election may be made at a general meeting of the shareholders, to be called for that purpose; and the directors in office when such failure of election takes place, shall remain in office until such election is made.

By section 33 a suspension by the bank of payment on demand in specie, of the notes or bills of the bank payable on demand, shall, if the time of suspension extend to sixty days consecutively, or at intervals within any twelve months, operate as and be a forfeiture of its charter, and of all and every the privileges granted to it by this or any other act.

By section 35, in case the debts of the bank exceed three times the stock paid in, and the deposits made in the bank in specie and government securities for money, or in case the total amount of the bills or notes of the bank intended for general circulation shall at any time exceed the amount by the act directed, the charter and all the privileges of the bank shall be forfeited, and the directors, under whose administration the excess shall happen, shall be liable jointly and severally in their private capacity; but such action or actions shall not exempt the said bank or its lands, tenements, goods or chattels, from being also liable for such excess.

By section 36, in case the property of the bank become insufficient to liquidate the liabilities thereof, the shareholders in their private capacity shall be liable for the deficiency thereof, but to no greater extent than to double the amount of their respective shares.

By section 38, if the bank shall advance or lend to or for the use of any foreign prince, power or state, any money or security for money, "then and from thenceforth the said corporation shall be dissolved, and all the powers, authorities, rights, privileges and advantages granted to it by this or any other act shall cease and determine."

The section which declares that the charter shall be forfeited in case the debts of the bank shall exceed three times the paid up stock and deposits, expressly provides for *the bank*, as well as the directors individually who are culpable, being proceeded against, and the lands and chattels of the bank being also followed.

The total annihilation, therefore, of the corporation is not contemplated by this section, and I see no reason why it must necessarily be annihilated under the other section relating to the suspension of specie payments, where the same kind of language is used as to a forfeiture of the charter.

The language in both of these sections is different from that used in the 38th section, which prohibits the lending to foreign powers. In this last case, "the corporation is thenceforth to be dissolved, and all its powers, &c., are to cease and determine." It does not follow that there must in all cases be a dissolution for all purposes: *Mayor of Colchester* v. *Brooke*, 7 Q. B. 382; *Woodbridge Union* v. *Colneis*, 13 Q. B. 285, and I think it would require a process of some kind formally to determine the corporation.

It would not surely be permitted to a defendant who was sued on his promissory note to the bank to plead in bar of the action a forfeiture of the charter by reason of the suspension of specie payments for sixty days, or that the bank debts exceeded three times its paid up stock and deposits, or that the bank was dissolved because it had made a loan to a foreign power.

There are appropriate remedies prescribed for each case, and nothing could be more inconvenient, perplexing and dangerous than to try so important a question upon a merely collateral issue, and I think the cases show that this will not be allowed: *The Queen* v. *Taylor*, 11 A. & E. 949; *The Attorney-General* v. *Avon*, 33 Beav. 67; 9 Jur. N. S. 1117; 9 L. T. N. S. 187; *Reg.* v. *Jones*, 8 L. T. N. S. 503.

When all the members of a corporation are dead, so that there is no one to proceed against, and there is no corporate body in fact or in law remaining, there must be an absolute dissolution without any process, from the actual necessity of the case; but as a general rule nothing short of a determination by some judicial power will, it seems, put an end to the existence of the functions of a corporation.

In my opinion the Bank of Upper Canada is notwithstanding the suspension of specie payments for more than sixty days and notwithstanding the assignment made to trustees, still a corporate body, liable to be sued and to have its property sold or administered for the satisfaction of debts, because it has not formally been dissolved, and because, although not formally dissolved, I am not satisfied it might not still be a corporation for the purpose of being wound up, or sued for the purpose of reaching its property and effects in satisfaction.

The general purport of the act is to enable depositors and other creditors, notwithstanding a forfeiture of the charter, to recover their debts, while the argument for the bank is that such persons have absolutely forfeited their claims, or that their only redress is now against the trustees.

I think this is not so. Then it was argued that at any rate the service upon Mr. Allan, fo the reasons before stated, was invalid.

It is clear by section 8 that the directors last elected still remain in office, at any rate until they resign it, and Mr. Allan, it is said, has not resigned; and it is clear by section 7 that the president whom the directors elect is to remain in office as such president *during the same period* as the directors remain in office, so long, at any rate, as they remain in office under the 7th section, which is for the ensuing twelve months from the annual meeting and election of directors on the 25th of June. But I am opinion that on a fair construction of the act the president, who must also be a director, remains in office as such president when a failure to elect directors has taken place, until the new election of directors, and the appointment of a new president has been made.

If this were not so, great difficulty might perhaps be occasioned by the loss of an integral part of the corporation.

If I am in error on either point the application can of course be reversed in the full court.

In the meantime I discharge the summons, and as it was moved with costs I discharge it with costs.

Summons discharged with costs.

De Blaquiere et al. v. Cottle et al.

Notice of trial—Irregularity.

A notice of trial was given for the 21st day of *September* instead of *October*. On an application to set it aside as irregular, the judge, though thinking the notice irregular, declined making an order to set it aside, preferring to let the parties proceed at their own risk.

Semble, that a notice intituled in the Queen's Bench "*for the next sittings of this Court*" was irregular.

[Chambers, October 21, 1867.]

Notice of trial intituled in the Queen's Bench was given in this cause "for the next sittings of this court, to be holden at the Court House in the Town of Woodstock, in and for the County of Oxford, on Monday, the 21st day of September, A. D. 1867. Dated the —— day of —— A D. 186—," and was served on the defendants attorney on the 24th of September.

A summons was taken out on the 16th of October, calling upon the plaintiffs to show cause why the copy and service of the paper purporting to be a notice of trial, should not be set aside for irregularity, in that the notice was given for the trial of the cause on Monday, the 21st of September, and no assizes were to be held on that day.

The assizes were fixed for Monday, the 21st of *October*, and the alleged irregularity was in specifying September instead of October.

W. Sidney Smith, shewed cause.

C. S. Givens, contra.

Adam Wilson, J.— The notice of trial is intituled in the *Queen's Bench*, and it is for the next sittings *of this Court*, to be holden at Woodstock. If the notice had been objected to upon that ground it would most likely have been held to be irregular, for the Court of Assize and *Nisi Prius* is quite a different Court from the Court of Queen's Bench, *Cross* v. *Lang*, 1 Dowl. 342. The only irregularity complained of in the summons is that the month is mistaken.

The notice would have been sufficient if it had been merely "for the next assizes to be holden at the Court House, in the Town of Woodstock, in and for the County of Oxford," without specifying any day, provided there had been a date to the notice, so that the particular sitting might have been clearly known, and perhaps it might have been sufficient even without the date, if the service or delivery can be considered as sufficiently indicating from what period the next assizes are to be computed or are to have relation; see *Henbury* v. *Rose*, 2 Str. 1237. The object of the notice is clearly and unequivocally to inform the party served, that the other party intends to proceed to trial at a certain time and place.

A notice of trial dated in Easter Term, 1856, for the second sittings in Easter Term *next*, was held to be sufficient, "next" being treated as surplusage, and it being considered that the defendant must have known that Easter Term of 1856 was meant, though he swore he thought it to be E. T, 1857, *Fenn* v. *Gunn*, 6 E. & B. 656.

It is said the defendant is not bound to return an irregular notice of trial, and that he does not waive any right by retaining it—that it is merely a matter of courtesy to return it, *Dernon* v. *Ibbotson*, 3 M. & W. 431, 6 Dowl. 547; but see *Brown* v. *Whitfull*, 8 Dowl. 592. Notwithstanding the service of the notice for the 21st of September, the plaintiff might, without withdrawing or countermanding that one, have served a fresh regular notice for the 21st of October, and proceeded upon it, *Fell* v. *Tyne*, 5 Dowl. 246.

I incline to think that in strictness the notice is irregular, but as the assizes take place this day, it will be better not to set aside the notice or service, but leave the parties to proceed at their own risk.

The summons came first before me on Thursday the 17th inst., but as I was engaged at the York Assizes, and was the only judge then in Town, I could not find time to dispose of the case before this day. If the defendants are inconvenienced by the lateness of my judgment, they have brought it on themselves by the delay in their application, whether purposely or not it is of no consequence to say.

I regret the delay on the plaintiffs' account, and I do all I can for them by not interfering with their proceedings, if they choose to run the risk of them. I granted the summons for only one ground of irregularity, but Mr. Givens said he mentioned the ground also as to the *sittings of this court*. I understood him to say his objections were the use of the word *sittings* in place of *assizes*, and not to the sittings *of this Court*. This being so, he should not on account of my misapprehension be prevented from relying on that ground if he have to move the full court hereafter, as he would be if he had not now taken the objection. —*Farmer* v. *Mountford*, 9 M. & W. 100.

I shall at present make no order.

CHANCERY CHAMBERS.

(*Reported by* J. W. Fletcher, Esq., *Barrister-at-Law.*)

Cossey v. Ducklow.

Practice—Printing bills of complaint—Taking off files for irregularity—Setting aside—Service—Costs.

Where the office copy of a bill of complaint served upon a defendant was not printed in accordance with the general orders of February 6, 1865, the service was set aside with costs.

It is irregular to move in Chambers to take a bill off the files because the prayer is unintelligible.

Although the Registrar or Deputy Registrar may have filed a bill not printed in compliance with the orders of Court, a motion to take such bill off the files for such non-compliance is regular.

S. H. Blake on behalf of the defendant Peter Ducklow moved in Chambers that the bill of complaint filed in the cause at Stratford be taken from the files of the Court for irregularity upon the following grounds: that dates and sums were therein printed in words and not in figures; that it was not printed on paper of the proper size and in the kind of type required by the orders of Court; that the prayer is unintelligible, and that it does not appear what relief is sought thereby, or that the service of the said bill be set aside on the above grounds, and on the ground that in the prayer a foreclosure is asked for, whereas the office copy of the bill

served is endorsed as if a sale only were prayed for.

Mr. Blake, in support of the motion, said that it was not purely a technical motion. It was highly important that the orders of Court in respect of procedure should be strictly observed and performed. The Court of Error and Appeal, the highest court in the land, required appeal books to be printed on paper of a certain size, and with type of a particular sort, and that court had more than once rejected appeal books because they were not so printed. The orders of this court of February, 1865, were explicit and must be observed.

He put in affidavits showing that the bill filed was printed with long primer instead of pica type, and showing that the office copy of said bill produced, and marked as an exhibit, was the office copy served on the defendant Peter Ducklow.

Moss, for plaintiff, submitted that there was no sufficient evidence that the original bill on the files was a printed bill, and that the office copy of bill produced is an office copy of the original. The original bill filed may be wholly written for anything that appears in evidence. He contended that the orders of February, 1865, imposed their own penalty, viz., that no costs of any improperly printed proceeding should be allowed. The orders would be inconsistent if such a motion as this were allowed, and the bill ordered to be taken off the files, as the penalty was provided for by the orders themselves. The particular penalty imposed by the orders was the only penalty that the Court would enforce, and it seemed quite heavy enough for the purpose intended.

The orders in question only applied to the Registrar at Toronto, and not to Deputy Registrars.

In any event the bill could not be taken off the files, as the evidence was insufficient to prove any irregularity in the bill filed, and service would be disallowed simply without costs, if the Secretary thought the action a proper one as to so much of it as related to the disallowance of the service.

Blake, in reply, said that it was only necessary to produce the office copy itself in order to prove the nature and form of the original bill on the files. The office copy of a bill is in the nature of a record, and proves itself on mere production. A printed office copy till duly certified is to be taken as an office copy of a printed original bill, and not of a bill wholly written, or partly written and partly printed.

The orders referred to all pleadings, whether filed with the Registrar or with the Deputy Registrar.

The rule was plain—nothing had been said or done to alter or vary it. The orders were not confined to the penalty named in them. The Court might, if it thought proper, impose any further penalty, and would take the most stringent means to enforce obedience to its orders. The defendant Ducklow has a right to ask the Court to compel the Deputy Registrar to comply with the order, or to put the defendant in the same position as if the Deputy had refused to comply with it.

The Secretary.—I do not think I can order the bill to be taken off the files, as there is no evidence before me that the original bill filed is printed in improper type, or even that it is printed at all. The argument, that as the office copy is printed I must assume that the original is printed, otherwise the copy served would not be an office copy, is untenable. It is not necessary that an office copy should be a fac-simile of the original.

I must, however, set aside the service upon the defendant Ducklow. The orders are plain and explicit in their terms, that pleadings and all other proceedings may be written or printed, or partly written and partly printed—that when printed, dates and sums occurring therein are to be expressed by figures instead of words—that they are to be written or printed on good paper of the size and form heretofore in use, and if printed they are to be printed in pica type.

Here the office copy is neither printed in pica type nor on paper of the proper size, and though wholly printed, dates and sums are not expressed by figures, but in words. The Deputy Registrar having filed the bill is no bar to the motion. It is true the order is express that he is not to file any bill which does not comply with its requirements, but he having neglected his duty is no reason why the Court should not interfere to enforce obedience of its own rule.

In the course of the argument it was urged that the only penalty for disobedience to the order is that the solicitor filing an irregularly printed bill cannot get the costs. The defendant might have abstained from making the present motion, and then in the event of the plaintiff obtaining a decree with costs, have objected on the taxation to any costs being allowed for the bill or the office copies, and I think the taxing officer would be bound to give effect to the objection, even though the bill had been received and filed by the Deputy Registrar, but I think there is nothing to prevent the defendant making the present motion if he choose to take such a course.

As to so much of the motion as seeks relief on the ground that the prayer of the bill is unintelligible, I cannot, I think, deal with it on a Chamber application. If such applications could be made in Chambers I fear the Chamber business of the Court would be increased to an alarming extent.

The plaintiff must pay the costs of the motion.

ENGLISH REPORTS.

CROWN CASES RESERVED.

Reg. v. Jarvis.

Evidence—Confession on inducement—Admissibility.

The prosecutor called the prisoner to his room, and said, "Jarvis, I think it is right I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue." A letter was then produced which Jarvis said he had not written, and the prosecutor then added, "Take care Jarvis, we know more than you think we know."

Held, that the answer of the prisoner in the nature of a confession was admissible in evidence.

[Nov. 23, 1867.—17 L. T., N. S., 178.]

Case reserved for the opinion of this Court by the Recorder of London, at a session of the Central Criminal Court held on the 8th July 1867 and following days.

Frank Jarvis, Richard Bulkley, and Wilford Bulkley were tried upon an indictment for feloniously stealing 138 yards of silk and other property of William Leaf and others, the masters of Jarvis.

There was a second count in the indictment for feloniously receiving the same goods.

William Leaf was examined, and said,

"The prisoner Jarvis was in my employ. On the 13th of May we called him up, when the officers were there, into our private counting-house. I said to him, 'Jarvis, I think it is right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two officers of the police, and I should advise you that, to any question that may be put to you, you will answer truthfully, so that if you have committed a fault, you may not add to it by stating what is untrue.' I produced a letter to him which he said he had not written, and I then said, 'Take care Jarvis, we know more than you think we know.' I do not believe I said to him 'You had better tell the truth'"

Counsel for the prisoner Jarvis objected to any statement of his, made after the above was said, being received in evidence, and referred to *Reg.* v. *Williams*, 2 Den. 433; *Reg.* v. *Warringham*, 15 Jur. 281; and *Reg.* v. *Garner*, 1 Den. 329; *Reg.* v *Shepherd*, 7 C. & P. 579; *Reg.* v. *Muller*, 3 Cox C. C. 507.

Counsel for the prosecution referred to *Reg.* v. *Baldry*, 2 Den. 430; *Reg.* v. *Sleeman*, Dears. 259; and *Reg.* v. *Parker and others*, L. & C. 42.

I decided that the statement was admissible.

The jury found Jarvis guilty, adding that they so found upon his own confession, but they thought that confession prompted by the inquiries put to him.

At the request of counsel for Jarvis, I reserved for the Court for the consideration of Crown Cases Reserved the question whether I ought to have admitted the statements of the prisoner in evidence against him.

If I ought not to have done so, the conviction should be reversed.

RUSSELL GURNEY, Recorder of London.

Coleridge, Q.C. (*Straight* with him), for the prisoner.—It is submitted that the prisoner's confession ought not to have been received in evidence. The rule is that every confession must be free and voluntary on the part of the accused: but if it is induced by any promise or threat on the part of the prosecutor, it is not receivable in evidence; *Reg.* v. *Baldry*, 19 L. T. 146. It is incumbent on the prosecution to show that the confession was free and voluntary, per Parke, B. (see note to report of *Reg.* v. *Baldry*, 2 Den. 430). The motive or intention of the prompter is immaterial, the question being what effect the inducement had or was likely to have on the mind of the accused. Different reasons for the rule have been assigned by Eyre, C. J., in *Warickshall's case*, 1 Leach C. C. 298, and by Pollock, C. B., in *Reg.* v. *Baldry*. Now, in the present case, the prosecutors were extremely anxious to get some information from Jarvis to criminate the other two persons, the Bulkleys, and it must be remembered that Jarvis was only a youth. The substance of what passed amounted to this: That the prosecutor intimated that if he did not tell the truth it would be worse for him, and if he did it would be better. If what passed had any influence, however slight, on the prisoner's mind, the confession was inadmissible. In *Reg.* v. *Baldry* the words used left it to the prisoner to speak out or not, as he chose. *Reg.* v. *Garner* is also a clear case on the opposite side of the line to *Reg.* v. *Baldry*. The learned counsel then referred to *Reg.* v. *Williams*, 3 Russ. on Crimes 377; *Reg.* v. *Sheppard*, 7 C. & P. 579; *Reg.* v. *Warringham* (*supra*); *Reg.* v. *Parker*; Leigh and Cave, 42.

Giffard, Q.C. (*Grain* with him), for the prosecutor was not called upon to argue.

KELLY, C.B.—I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced, either by a threat or a promise, to say anything of a criminatory character against himself. So, on the other hand, I watch jealously every attempt to break in upon those rules and decisions that have been laid down for public justice. In this case I have listened to the very able argument of Mr. Coleridge, but when I look at the question before us I entertain no doubt upon it. Do the words used by the prosecutor, when substantially, fairly, and reasonably considered, import a threat or promise to the accused, according as he should answer? To my mind, they appear to operate only as a warning to put the accused on his guard as to how he should answer, and not as a threat or promise. In the first place, they are not so much an exhortation to confess as advice given, and the reason of the advice is also given. It amounts to this: "We are going to put certain questions to you, and I advise you that if you have committed a fault you do not add to it by stating what is untrue." So far the words used are not within any rule of law that would prevent the answer from being admissible in evidence. Then we come to the rest of the words. A letter was then produced by the prosecutor, which the accused said he had not written, and the prosecutor then said, "Take care, Jarvis, we know more than you think." That was only an additional caution to the prisoner not to add the guilt of falsehood to the other fault. In many of the reported cases the words used seem to have acquired a technical signification; but the words used in this case have no such meaning; they seem to me to import advice only to the accused, and not a threat or promise. The conviction, therefore, must be affirmed.

The other judges concurred.

Conviction affirmed.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF MAY, JUNE AND JULY, 1867.

(*Continued from page* 335, *Vol. III. N.S.*)

LANDLORD AND TENANT.

1. One who agrees to let, impliedly promises that he has a good title to let.—*Stranks* v. *St. John*, Law Rep. 2 C. P. 376.

2. In a lease, the lessee covenanted not to assign without license, and the lessor covenanted not to withhold his license "unreasonably or vexatiously." *Held*, that it was unreasonable and vexatious in the lessor to refuse his license to assign to a person wholly unobjectionable, his object in refusing being avowedly his wish to get a surrender of the lease for the purpose of rebuilding. The court decreed the lessor to concur in the assignment, and directed an inquiry to assess the damages to be awarded to the assignee for refusal of the license.—*Lehmann* v. *McArthur*, Law Rep. 3 Eq. 746.

3. The city council of M. were empowered by statute to order streets to be paved by the owners of the adjoining premises, and, in case of their default, to do the work themselves, and to charge the respective owners with their proportionate part of the expenses; and, as an additional remedy, the council were empowered to require payment from any tenant or occupier, to be levied by distress, and it was made compulsory on the owner to allow such payments to be deducted from the rent. Premises in G. street were demised by the plaintiff to the defendant at a "clear yearly rent," the defendant covenanting to "pay and discharge all taxes, rates, assessments and impositions whatever, which during the term should become payable in respect of the demised premises." Subsequently the council gave notice to have G. street paved. The plaintiff neglecting to do the required work, the council caused it to be done, and the plaintiff paid his proportional share of the expense. *Held*, that the payment having been made by the plaintiff, not for a rate, assessment or imposition, payable in respect of the premises, but for breach of duty imposed on him by statute, he could not compel the defendant, under his covenant, to repay him the amount.—*Tidswell* v. *Whitworth*, Law Rep. 2 C. P. 326.

See ILLEGAL CONTRACT.

LEGACY.

1. Testatrix, a markswoman, made a will shortly before her death, in which the only bequest was a gift of her "personal property, consisting of money and clothes." Beside cash and clothes, she owned at her death money out on mortgage, money secured on a promissory note, and a reversionary interest in a sum of cash. *Held*, that the words "consisting of money and clothes" did not cut down the preceding general words, and that the whole of her personal estate passed by the will.—*Dean* v. *Gibson*, Law Rep. 3 Eq. 713.

2. A testator gave the money to be received under a life-policy, which, at the date of the will, would have amounted to £6,416, to trustees, on trust, to invest it in government securities, pay the income to his wife for life, and, after her death, to pay thereout two sums of £2,000 each, which he had covenanted to settle on his daughters; and he gave £1,000, part of the residue, to A., £1,000 to B., and "£416, residue and remainder of the moneys to be received under the policy, after payment of the said four several sums of £2,000, £2,000, £1,000, and £1,000, with any future additions that may be made on the policy," to C. £6,532 was received under the policy, and invested in reduced three per cents at ninety-four. At the widow's death, the stock had fallen to eighty-nine. *Held*, that the legacy to C. was a specific legacy of £532, and that, therefore the legacies to A., B., and C., must abate ratably.—*Walpole* v. *Apthorp*, Law Rep. 4 Eq. 37.

See DEVISE; ESTATE BY IMPLICATION; MORTMAIN, 1, 2; POWER; WILL, 5–8.

LEGACY DUTY.—*See* ADMINISTRATION, 3.

LETTER OF CREDIT.—*See* BILLS AND NOTES.

LICENSE.—*See* NEGLIGENCE, 2.

LUNATIC.—*See* NULLITY OF MARRIAGE.

MAINTENANCE.—*See* TRUST, 3.

MANSLAUGHTER.—*See* AUTREFOIS CONVICT.

MARRIAGE.—*See* CRUELTY; DESERTION; FRAUDS, STATUTE OF, 2; NULLITY OF MARRIAGE.

MARRIED WOMAN.—*See* HUSBAND AND WIFE.

MARSHALLING OF ASSETS.

Policies issued by an insurance company provided that the capital of the company should alone be liable to claims in respect of the policies. The company was wound up, and the capital applied in paying dividends on the debts due to policy holders and general creditors, *pari passu*. *Held*, that the doctrine of marshalling did not apply, and no calls could be made on the shareholders for the purpose of recouping to the policy holders the amount of capital which had been paid to the general creditors; but that a call should be made only

to pay the balance due the general creditors, including those shareholders who were general creditors. — *In re Professional Life Ins. Co.*, Law Rep. 3 Eq. 668.

Mines.

A reservation "of mines and minerals within and under" land includes stone used for road-making and paving, and quarries as well as underground mines.—*Midland Railway Co.* v. *Checkley*, Law Rep. 4 Eq. 19.

Misrepresentation—

1. A prospectus of a railway company stated that "the engineer's report may be inspected, and further information obtained, at the office." A. applied for shares on a printed form, which stated that he agreed to be bound by the conditions in the memorandum and articles of association. An examination of these papers would have given him the information, the want of which he alleged as a reason for rescinding his contract. Trusting to the statements in the prospectus, he did not examine them. *Held*, that his neglect to examine them was no answer on a bill by him to be relieved from his contract to take shares on the ground of misrepresentations and concealment in the prospectus.—*Central Railway Co.* v. *Kisch*, Law Rep. 2 H. L. 99.

2. The defendants' manager gave the plaintiff a guarantee, that, if he would supply D., a customer of theirs, with goods to carry out a government contract, they would pay D.'s check in the plaintiff's favor, on receipt of the government money, in priority to any other payment "except to this bank." D. then owed the bank £12,000, but the plaintiff did not know this, nor did the manager tell him. The plaintiff supplied goods to the value of £1,227; the government money to £2,676 was paid by D. into the bank; but the defendants refused to pay the plaintiff, and claimed to retain the whole in payment of D.'s debt to them. In an action for false representation and for money had and received, *held*, (1) that there was evidence for the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed the fact which would make it so; (2) that the defendants would be liable for such fraud in their agent; and (3) that the fraud was properly laid as the fraud of the defendants. Whether the plaintiff could have recovered under the count for money had and received, *quære*.—*Barwick* v. *English Joint Stock Bank*, Law Rep. 2 Ex. 259.

Mistake.

A. agreed to hire a fishery from B., A. and B. both believing that under a private statute it belonged to B. A. afterwards procured a copy of the statute, and found that by it the fishery belonged to himself. On cause petition by A. (in Ireland), praying that the agreement might be cancelled and for other relief, *held*, that the agreement should be cancelled as founded on mutual mistake, and that there should be a declaration of A.'s title.—*Cooper* v. *Phibbs*, Law Rep. 2 H. L. 149.

Mortgage.—*See* Admiralty, 2; Benefit Society; Foreign Court; Priority, 1, 2.

Mortmain.

1. A bequest to the trustees of a chapel in C. to be applied towards the erection of a new chapel in C. *Held*, that the bequest was not void as against the statute of mortmain, if there was land belonging to the trustees at the date of the will, on which a new chapel could be built in substitution for the old one.—*Booth* v. *Carter*, Law Rep. 3 Eq. 757.

2. A., being entitled to moneys secured by bond and mortgage, bequeathed all her property to her daughters, B., C., and D., whom she appointed executrixes. B. died before A.'s death, and C. died intestate soon after A.'s death, and D. became alone entitled to said moneys. The moneys were not called in during D.'s life, who by her will gave legacies to charities, *Held*, that the court would not assume, in favor of the charities, a conversion into pure personalty, which D. was not bound to make.—*Lucas* v. *Jones*, Law Rep. 4 Eq. 73.

3. A testatrix gave her property not applicable under her will for the purpose of mortmain to A., and B., his son, as joint tenants. She gave her property applicable for the purposes of mortmain to certain charities. She died possessed of large property, of which the greater part was realty. A. was her confidential adviser. It appeared from evidence that A. was aware of the gift in the lifetime of the testatrix, and that it was intended by her to be applied for charity, and that either by silence or acquiescence he had led her to suppose that it would be so applied. On bill by the heirs of the testatrix, *held*, that the gift to A. and B. could not be upheld, and that they were trustees for the plaintiffs.—*Jones* v. *Bradley*, Law Rep. 3 Eq. 635.

Negligence.

1. The plaintiff being on the premises of the defendant, a sugar-refiner, on lawful business, in the course of fulfilling a contract in which the plaintiff's employer and the defendant both had an interest, fell through an unfenced hole in the floor, without negligence on his part, and

was injured. The premises were constructed in the manner usual in the defendant's business; but the hole could, when not in use, have been fenced without injury to the business. *Held*, that the defendant was liable.—*Indermaur* v. *Dames*, (Exch. Ch.) Law Rep. 2 C. P. 311.

2. The declaration alleged that the defendants were possessed of land with a canal intersecting the same, and of bridges across the canal communicating with certain docks of the defendants, which lands and bridges were used, with the permission of the defendants, by persons coming to and from the docks; that the defendants wrongfully and improperly kept and maintained the land, canal, and bridges, and suffered them to be in so improper a state, as to render them unsafe for persons lawfully passing over the said land and bridges towards the said docks; and that G., lawfully passing over and using the bridges, through the wrongful, negligent, and improper conduct of the defendants, fell into one of the canals, and was injured. *Held*, that the declaration disclosed no actionable breach of duty by the defendants.—*Gautret* v. *Egerton*, Law Rep. 2 C. P. 371.

3. The defendant, under a contract with the Metropolitan Board of Works, opened a public highway for the purpose of constructing a sewer; three or four months after the work was finished, the plaintiff's horse was injured by stumbling in a hole in the road. The defendant had properly filled up the road; and the hole was owing to the natural subsidence which sometimes takes place, sooner or later, after such an excavation. *Held*, that the defendant was not liable for the damage; for that the obligation of the defendant, as between him and the public, ceased as soon as he had properly reinstated the road, it being the duty of the parish to look after the subsequent repairs, whether rendered necessary by subsidence or ordinary wear and tear. — *Hyams* v. *Webster*, Law Rep. 2 Q. B. 264.

4. The defendant, a contractor employed by a board of works to enlarge a sewer, made a dam in the sewer, the water above which was removed by pumping. Owing to his negligence in not working the pumps, the sewage flowed on to and injured the plaintiff's premises. *Held*, that the injury was occasioned by acts "done, or intended to be done, under the powers of a board of works," within 25 & 26 Vict. c. 102, sec. 106, and that the defendant was therefore entitled to a notice of an action.—*Poulsum* v. *Thirst*, Law Rep. 2 C. P. 449.

See Carrier, 1–4; Ship, 3.

Notice.—*See* Negligence, 4; Priority, 1, 2.

Nuisance.—*See* Watercourse, 1, 2.

Nullity of Marriage.

1. If the mind of a person entering into marriage appears to have been diseased, the court, on a petition for nullity, will not consider the extent of the derangement.—*Hancock* (*falsely called Peaty*) v. *Peaty*, Law Rep. 1 P. & D. 335.

2. Where a guardian *ad litem* had been assigned to a lunatic, a petitioner for nullity of marriage, the court declined, during the hearing of the petition, to adjourn the case on the respondent's application, suggesting the petisioner's recovery, and her desire for the discontinuance of the suit, or to appoint two medical men to examine her; but, after being satisfied by the evidence that she was insane at the time of the marriage, postponed the decree, to give the respondent an opportunity of establishing the fact of the petitioner's recovery; and intimated, that, if satisfied of her recovery, it would not pronounce a decree except at her instance. After three weeks, the guardian *ad litem* obtained a rule for the respondent to show cause why a decree should not be pronounced; and the respondent not showing cause, a decree of nullity was pronounced.—*Ib.*

Payment.—*See* Principal and Agent, 2.

Penalty.—*See* Benefit Society.

Pilot.—*See* Ship, 3.

Pleading.—*See* Admiralty, 1; Award, 4; Composition Deed, 1; Equity Pleading and Practice, 1–3; Misrepresentation, 2; Release.

Power.

A testator gave all his property to his wife for life, and directed her to pay his debts, and, "at her decease, to make such distribution and disposal of my then remaining property among my children as may seem just according to her discretion." *Held*, a power to the wife, exercisable by will only, to appoint in favor of the children living at her death.—*Freeland* v. *Pearson*, Law Rep. 3 Eq. 658.

See Trust, 3; Will, 4.

Practice.—*See* Equity Pleading and Practice Probate Practice.

Prescription.—*See* Watercourse, 1.

Principal and Agent.

1. One J., by the authority of the promoters of a proposed railway company, and by means of a check signed by them, obtained from the plaintiff money to pay parliamentary fees, on an agreement expressing that it was "to be repaid out of the calls on shares." The act incorporating the company was passed, the pro-

moters being named as the first directors; and at a subsequent meeting the directors adopted the acts of J. No shares were allotted or calls made, and the undertaking was not proceeded with. *Held*, that the promoters were personally liable, notwithstanding the subsequent adoption of their acts.—*Scott* v. *Lord Ebury*, Law Rep. 2 C. P. 255.

2. A., having bought goods of B. through a broker, paid for them to the broker, partly by an advance on his general account with the broker before the delivery of goods, and partly by cash on a settlement of accounts after the delivery. The broker did not pay over the money to B., and became bankrupt. In an action by B. against A. to recover the price of the goods, except so much as had been paid in cash, *held* (reversing the judgment of the Court of Common Pleas), that it was a question for the jury, whether payment to a broker in advance was a good payment as against the principal, depending on the custom of the trade; and the question not having been left to the jury, a new trial was ordered.—*Catterall* v. *Hindle*, (Exch. Ch.) Law Rep. 2 C. P. 368.

See Bill of Lading; Interest, 1; Misrepresentation, 2; Railway, 1.

Priority.

1. Personal property was settled on such terms as A. should appoint, and was appointed by A. to trustees in trust for S. The property remained under the control of the trustees of the original settlement. *Held*, that a mortgagee of S.'s interest, who gave notice of his mortgage to the trustees under the appointment, but not to the trustees under the original settlement, should be postponed to a subsequent mortgagee, without notice of the prior mortgage, who had given notice to both sets of trustees.—*Bridge* v. *Beadon*, Law Rep. 3 Eq. 664.

2. A testator, in 1832, devised copyhold estate, subject to a mortgage, to his wife for life, and then to his children. The will was never proved, and no notice of it was entered on the court rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851, the son falsely representing himself to be in possession as heir to his father, procured a further advance on mortgage, the original mortgage being transferred to the second mortgagee. The widow died in 1860. *Held*, that the mortgagee, having the legal estate and having no notice of any adverse title, was entitled to tack his further advance.—*Young* v. *Young*, Law Rep. 3 Eq. 801.

3. The 17 & 18 Vict. c. 36, sec. 1, provides that every bill of sale not registered within twenty-one days shall be void as against the assignees in bankruptcy, and the execution creditors of the person making the bill of sale, as to any goods then in his possession. A. made a bill of sale to S., which was not registered; afterwards he made another bill of sale of the same goods to H., which was registered. Execution having issued against A., S. and H. both claimed the goods; and an order was made by which the execution creditors were barred, and the goods ordered to be delivered to H. *Held*, that the order was right, and that S. could not set up his bill of sale against H.; for that the consequence of avoiding an unregistered bill of sale by execution is to displace the security altogether.—*Richards* v. *James*, Law Rep. 2 Q. B. 285.

Probate Practice.

1. Probate will not be granted of a will disposing of real property only, though it appoints an executor, and gives the real estate to him, to be converted into personal estate.—*Goods of Barden*, Law Rep. 1 P. & D. 325.

2. An executor who has proved a will in common form cannot take proceedings to call its validity in question. He cannot, therefore, cite those interested under it to propound it in solemn form, or show cause why the probate should not be revoked. The executor of an executor is in the same position in this respect as the original executor.—*Goods of Chamberlain*, Law Rep. 1 P. & D. 316.

See Administration, 1, 2.

Production of Documents.

1. A defendant cannot refuse to produce private and confidential letters from a stranger, on the ground that the writers forbid their production; but the plaintiff will be put on an undertaking not to use them for any collateral object.—*Hopkinson* v. *Lord Burghley*, Law Rep. 2 Ch. 447.

2. On a motion in a cause in admiralty, by the defendants, for leave to inspect certain letters between the plaintiff and his agent, the judge directed them produced for his own inspection before granting the application.—*The Macgregor Laird*, Law Rep. 1 Adm. & Ec. 307.

Promissory Note.—*See* Bills and Notes; Trust, 2.

Proximate Cause.

On the trial of an action for a reward, offered by the defendant, "to any person who will give such information as shall lead to the apprehension and conviction of the thieves" who had stolen watches and jewelry from his shop, it appeared, that, about a week after the theft, R., having brought one of the stolen watches

to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day; that, after two or three days, R., being in custody, told where some of the thieves would be found; that there they were apprehended a week afterwards; that they were subsequently convicted of the theft, and that R. was convicted as receiver. *Held*, that the judge had properly left the evidence to the jury, pointing out the remoteness of the information; and that a verdict for the plaintiff ought not to be set aside. — *Turner* v. *Walker*, (Exch. Ch.) Law Rep. 2 Q. B. 301.

Railway.

1. The general manager of a railway has authority to bind the company to pay for medical attendance for a servant of the company injured by an accident on the railway.—*Walker* v. *Great Western Railway Co.*, Law Rep. 2 Ex. 228.

2. A railway company gave a bond to a contractor, who transferred it to the plaintiff, to secure an advance then made to him by the plaintiff. The plaintiff having in the name of the obligee brought an action on the bond, it was compromised before judgment, on the company's transferring to him all their rolling stock as security. The rolling stock was transferred accordingly, but was subsequently seized by the defendant, an execution creditor of the company. On the trial of an interpleader issue before the plaintiff and defendant, *held*, (1) that evidence was not admissible to impeach the original legality of the bond; (2) that the conveyance of the rolling stock to the plaintiff was valid as against the defendant.—*Blackmore* v. *Yates*, Law Rep. 2 Ex. 225.

See Carrier; Specific Performance.

Release.

To an action of debt the defendant pleaded a release of all "actions, suits, claims, and demands," which release had been given since the commencement of the suit. *Held*, that the release discharged not only the debt, but also damages for its detention and costs, and therefore was properly pleaded as a defence to the whole action. — *Tetley* v. *Wanless*, (Exch. Ch.) Law Rep. 2 Ex. 275.

Repeal of Statute.—*See* Bankruptcy, 5.

Revocation of Will.—*See* Will, 3.

Reward, Action for.—*See* Proximate Cause.

Sale.

1. A. contracted to supply B. with goods, "delivering on April 17, complete 8th May." A. made no delivery on the 17th; and B., on the following day, rescinded the contract, and refused subsequent tenders of the goods. The plaintiffs having brought an action for non-acceptance, *held*, that if, on the true construction of the contract, A. was bound to commence delivery on April 17th, the defendants were entitled to rescind for failure to deliver on that day; *Held*, further, (by Kelly, C. B., and Pigott, B.), that the contract did not bind the seller to commence delivery on the 17th, but only to deliver at reasonable times between April 17th and May 8th; (by Martin and Bramwell, B.B.), that it did bind the seller to commence delivery on the 17th.—*Coddington* v. *Paleologo*, Law Rep. 2 Ex. 193.

2. The plaintiff sold the defendants 128 bales of cotton, marked $\frac{D.\ C.}{e.}$ at 25*d.* per lb., "expected to arrive per Cheviot, the cotton guaranteed equal to sample. Should the quality prove inferior to the guarantee, a fair allowance is to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked $\frac{D.\ C.}{e.}$ which arrived by the Cheviot, contained "Western Madras" cotton. Western Madras cotton is inferior and of less value than Long-staple Salem, and requires different machinery for its manufacture. *Held*, that the defendants were not bound to receive the cotton, the allowance clause referring to inferiority of quality only, not to difference of kind.—*Azemar* v. *Casella*, Law Rep. 2 C. P. 431.

See Frauds, Statute of.

Satisfaction.—*See* Will, 5.

Scire Facias.

The court cannot refuse to issue a *sci. fa.* to obtain execution, on the ground that the judgment is erroneous on its face.— *Williams* v. *Sidmouth Railway and Harbor Co.*, Law Rep. 2 Ex. 284.

Sentence.—*See* Conviction.

Separate Estate.—*See* Husband and Wife.

Ship.

1. Goods were shipped under a bill of lading, containing the usual exceptions of "all dangers and accidents of the sea and navigation of what kind and nature soever." The goods were injured during the voyage by rats, though the ship-owner had taken all possible precautions to prevent it. *Held*, that the ship-owner was liable.—*Kay* v. *Wheeler*, (Exch. Ch.) Law Rep. 2 C. P. 302.

2. By a bill of lading, freight was to be paid, "one-third in cash on arrival at B., and two-thirds on right delivery of the cargo, by bills at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B. The one-third freight was paid,

and the shipper declared his election to pay the remaining two-thirds in cash less interest. *Held*, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts; and that the master was not bound to deliver the cargo unless the consignee paid, or was ready and willing at the same time to pay, the balance of the freight.—*Paynter* v. *James*, Law Rep. 2 C. P. 348.

2. To obtain the benefit of the 17 & 18 Vict. c. 104, sec. 388, exempting the owner of a ship having, by compulsion of law, a pilot on board, from liability for damage by default of the pilot, it is not enough to show that the pilot was in fault, but also that there was no default on the part of the master and crew, which might have in any degree been conducive to the damage; therefore, where the master and crew neglected to keep a good look-out, and such neglect conduced to a collision, the owners were *held* liable. The duty of a pilot is to attend to the navigation, and of the master and crew to keep a good look-out.—*The Iona*, Law Rep. 1 P. C. 426.

See Admiralty; Bill of Lading; Foreign Court; Insurance; Stoppage in Transitu.

Solicitor.

An agreement between a solicitor and a client, that the solicitor shall be paid a fixed salary, clear of all office expenses, and including all emoluments, he paying to the client any surplus of receipts over payments, and that the solicitor shall transact no professional business for any other client, is not opposed to the policy of the law.—*Galloway* v. *Corporation of London*, Law Rep. 4 Eq. 90.

Special Performance.

A. made an agreement as to crossings on a railway running through his land, the agreement was not carried into effect. *Held*, that he could not, on the ground of any general right, claim to have the crossings made at the discretion of the court of chancery.—*Earl of Darnley* v. *London, Chatham and Dover Railway*, Law Rep. 2 H. L. 43.

See Husband and Wife, 2; Vendor and Purchaser of Real Estate, 1.

Statute of Frauds.—*See* Frauds, Statute of.

Statute, Repeal of.—*See* Bankruptcy, 5.

Stoppage in Transitu.

Goods were shipped by the vendor on a general ship, belonging, as the vendor knew, to the purchaser. Three parts of the bill of lading, by which the goods were delivered at G. to the purchaser or assigns, were handed to the vendor, and the fourth retained by the master. *Held*, that the right to stop *in transitu* before delivery at G. was gone.—*Schotsmans* v. *Lancashire and Yorkshire Railway Co.*, Law Rep. 2 Ch. 332.

See Equity, 1.

Succession Duty.—*See* Administration, 3.

Surety.

A surety who has signed a bond, on the faith of its being signed by the principal debtor also, is bound, though the principal has never signed it, if the principal has executed an instrument on which the creditor may sue him, and become a specialty creditor of his.—*Cooper* v. *Evans*, Law Rep. 4 Eq. 45.

See Guaranty.

Threat.

Forcing a builder by threats to discharge a workman because he was not a member of a trade's union, is punishable under 6 Geo. IV. c. 129, sec. 3, which prohibits forcing a master by threats "to limit the *description* of his workmen.—*Skinner* v. *Kitch*, Law Rep. 2 Q. B. 339.

Trust.

1. Money was, without valuable consideration, given to a trustee, to be held on certain trusts then declared, and it was agreed that the transaction should be ratified and completed by a deed; and a deed was afterwards executed wholly inconsistent with the trusts declared by parol. The court ordered the deed cancelled, and the money repaid to the settler who had executed the deed in ignorance of its legal effect—*Lister* v. *Hodgson*, Law Rep. 4 Eq. 30.

2. E., by voluntary deed, in 1858, assigned certain property and "all other her personal estate" to R. absolutely, and appointed R. her attorney, in her name, but for R.'s sole benefit, to sue for the assigned premises, and to do all acts necessary for deriving the full benefit of the assignment. E. owned certain promissory notes, which were not mentioned in the deed. Shortly after E. died. On R.'s death, in 1864, these notes were found in his possession, but not indorsed to him; there was no evidence of any delivery of them by E. to R. *Held*, that the property in the notes passed by the deed to R., on the principle that the deed operated as a complete declaration of trust by E. of all her personalty property in favor of R.—*Richardson* v. *Richardson*, Law Rep. 3 Eq. 686.

3. By a marriage settlement, trustees were to hold £2,000 (coming from the wife's father) on trust, after the wife's death, for her children, their shares to be vested at twenty-one or marriage; with a proviso, that, till the principal should be payable to the children, the

trustees should apply the whole, or so much of the dividends as they should think fit, for the education or maintenence of the children. The wife died, leaving one child. *Held*, that this was a discretionary trust for maintenance, and not simply a power, and that the father was entitled to an allowance for past and future maintenance of his child, without reference to his ability to provide such maintenance, and an inquiry was directed as to the amount to be so applied. — *Ransome* v. *Burgess*, Law Rep. 3 Eq. 773.

See Charity; Mortmain, 3; Priority, 1.

Vendor and Purchaser of Real Estate.

1. In a suit by a vendor for specific performance, it was certified that a good title was not shown; the court ordered a return to the defendant of his deposit money, with interest at four per cent, and declared the defendant entitled to a lien on the estate for the same and for his costs.—*Turner* v. *Marriott*, Law Rep. 3 Eq. 744.

2. The plaintiff agreed to sell land to a railway company for a price payable on completion of the purchase, with interest at four per cent from the date of the agreement. The company were to be at liberty to take possession on making a certain deposit. If, from any other cause than the vendor's default, the purchase was not completed in six months, interest from the expiration of the six months was to be at the rate of five per cent. The deposit was made and possession taken. The company, when pressed to complete, more than three years after the agreement, alleged inability from want of funds. *Held*, that the plaintiff was not entitled to an order, on motion for payment of the balance of the purchase money into court.—*Pryse* v. *Cambrian Railway Co.*, Law Rep. 2 Ch. 444.

Voluntary Conveyance.—*See* Trust, 1, 2.

Waiver.—*See* Award, 7.

Warranty.—*See* Carrier, 1, 5.

Watercourse.

1. Where there is a prescriptive right to foul a stream, the fouling cannot be considerably enlarged to the prejudice of others; and the fact that the stream is fouled by others is no defence to a suit to restrain the fouling by one. — *Crossley & Sons* v. *Lightowler*, Law Rep. 2 Ch. 478.

2. C., wishing to prevent a river's being fouled by some dye-works, purchased from the owners of the works some land on the river, without telling them his object. *Held*, in the absence of any express reservation, by the owners of the works, of the right of fouling, C. could maintain a suit to restrain it.—*Ib.*

3. Where dye-works had not been used for twenty years, and had been allowed to fall into ruin, and there appeared no intention of erecting new ones, *held*, that the right of fouling a stream attached to them had been abandoned. and lost.—*Crossley & Sons* v. *Lightowler*, Law Rep. 2 Ch. 478.

Way.—*See* Negligence, 3.

Will.

1. A will filled the first and third pages of a sheet of paper, leaving no room on the third page for the signatures of the testator and witnesses, which were written crossways on the second page. *Held*, that the will was duly executed.—*Goods of Coombs*, Law Rep. 1 P. & D. 302.

2. Some slight alterations and interlineations appear on a holograph will; there was no evidence whether they were made before or after execution, except the affidavit of an expert, who thought them written when the will was. The court admitted them to probate.—*Goods of Hindmarch*, Law Rep. 1 P. & D. 307.

3. A will was found after a testator's death, but parol evidence was given that he had made a later will, which revoked the former, and which had remained in his custody and could not be found, and that he had declared an intention to destroy it. The court pronounced for an intestacy.—*Wood* v. *Wood*, Law Rep. 1 P. & D. 309.

4. A married woman made a will in pursuance of a will therein recited, leaving all the property comprised in the power to her son By a later will, containing no recital of a power and no words of revocation, she left all her property to her son. She had property other than that appointed by the first will on which the second will could operate. Probate was granted of both wills, as together containing the will of the deceased. — *Goods of Fenwick*, Law Rep. 1 P. & D. 319.

5. A., on the marriage of his daughter, M., covenanted to pay to trustees £10,000, with interest till payment, in trust to pay £200 a year to M. for life, the residue of the income to her husband; on the death of either, the whole income to the survivor, and, after the death of the survivor, to the children; if no child, and M. should survive her husband, to her absolutely; if she died in her husband's life, then as she should appoint, and, in default of appointment, to the next of kin. The principal was not demanded in A.'s life, but the interest was paid. A. afterwards made giving

his property to trustees, "in the first place, to pay his debts and legacies," and then to divide the residue into equal moieties, and to pay the income thereof to his daughters, M. and N., respectively, and, on the decease of either, to pay her moiety to such person (exclusive of her husband) as she should appoint. *Held*, that the gift in the will was not a satisfaction of the covenant, and that the £10,000 must be deducted before the division into moieties.—*Lord Chichester* v. *Coventry*, Law Rep. 2 H. L. 71.

6. A testator who had been twice married, and had three children by the first marriage and two by the second, gave his property to the five in equal shares, payable at twenty-one, with a gift over in case of death before the shares became payable; and he directed, that, if his children by his first wife, or either of them, should receive any moneys as the children of their mother, such moneys should be considered deducted from their shares, it being his wish that all his children should share, and share alike. After the eldest child had attained twenty-one, but before any of the rest had done so, the children of the first marriage became entitled to a fund as children of their mother. *Held*, that as the share coming to the eldest son could not be deducted from his share of his father's property, and as it was intended that the proviso in the will should affect all the children alike, no deduction should be made from the shares of any of the children of the first marriage.—*Stares* v. *Penton*, Law Rep. 4 Eq. 40.

7. Testator gave £20,000 to A. for life, with remainder, "in case F., the eldest son of A., shall be living," to F. for life, remainder to F.'s children, and, in default of children, to A.'s other sons, successively, in strict settlement. He also gave a share of the residue to A. for life, remainder to "all the children of A., except F." F. died in A.'s lifetime, unmarried, when B. became the eldest son of A. *Held*, notwithstanding, that B. was entitled to a share in the residue, and that the representatives of F. were excluded.—*Wood* v. *Wood*, Law Rep. 4 Eq. 48.

8. A testator gave his real and personal estate to trustees, as to one-fourth, to A. for life, and after her death to her children, and, in default of children, to B., C. and D., and their issue, in the same manner as thereinafter directed respecting their original shares; as to another fourth, to B. for life, and after his death to his children, and, in default of children, to A., C. and D., and their issue, in the same manner as directed respecting the original shares; as to another fourth, on trust for C. and her children, referring to the share of A. with the same expressions as are used in giving the fourth share; and the fourth share he gave on trust for D. and his children on the trusts, and subject to the powers and authorities, and with the like remainders over in default of issue, and similar, and in all respects corresponding with the trusts, powers and authorities expressed and declared concerning the share given to B. and his children as effectually as if the same trusts were there repeated. D. died unmarried. *Held*, that the fourth share went over to A., B. and C.—*Surtees* v. *Hopkinson*, Law Rep. 4 Eq. 98.

Witness.

To impeach the veracity of a witness, witnesses may be called to swear that they would not believe him on oath.—*The Queen* v. *Brown*, Law Rep. 1 C. C. 70.

See Administration; Devise; Legacy.

Words.

"*Claims and demands.*"—See Release.

"*Constructive Fraud.*"—See Fraud.

"*Mines and Minerals.*"—See Mines.

"*On*" *a day certain.*"—See Sale, 1.

"*On delivery.*"—See Ship, 2.

"*Suffer.*"—See Forfeiture.

"*Unreasonable or vexatious.*"—See Landlord and Tenant, 2.

REVIEW.

The Canadian Parliamentary Companion. Edited by Henry J. Morgan. Fourth Edition. Ottawa: Printed by G. E. Desbarats, 1867. Price $1.

This is a new edition of a little work that is now well known to our public men. It appears to have been prepared with great care and attention. The information given is very useful, and is given in a compressed and portable form.

The work consists of two parts. In the first we have a description of the Governor General and Staff, the Privy Council of the Dominion, the Deputy Heads of Departments, and sketches of the Members of the Senate.

In the second part we have an explanation of Parliamentary terms and proceedings, which is not the least valuable part of the work. This is followed by a description of each member of the House of Commons, arranged according to name in alphabetical order. His titles and his politics, whether Conservative or Liberal, are given. There is also a short sketch of his life, the name of his constituency, its population, the name of his opponent, and his majority over his opponent. Some of the sketches are interesting. That of Sir John A.

Macdonald, the Premier of the Dominion, is particularly so. A list of the public measures introduced by him in the Legislature, and now law, and numbering no less than forty-seven, is given. This is a new feature in the work, and one which cannot be too highly commended.

A new edition of the work is promised early in February next. It will include notices of the members of the several local legislatures of the Dominion. In the edition now before us, however, there is a list of the members of the Local Government and Legislatures in each of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick.

The editor, Mr. Morgan, has already, by his numerous works, acquired a name for industry, and ability which does him much credit. When we reviewed his first work we predicted a useful career for him, and it is satisfactiory to know that already our prediction has been to a great extent realized. We wish him all the success that his energy, ability and industry deserves.

BOOKS RECEIVED.

The Law Times—(The Journal of the Law and the Lawyers)—and the Law Times Reports — 10 Wellington St. Strand, W. C. London.

The Solicitors' Journal and Weekly Reporter—59 Carry St., Lincoln's Inn, W. C. London.

These publications are received with much regularity. They still maintain the character which their excellent management has acquired for them.

Sessional Proceedings of the Association for the Promotion of Social Science—1 Adam Street Adelphi, W.C., London.

The Lower Canada Jurist—(collection de decisions du Bas Canada) under the Editorial management of S. Bethune, Q. C., P. R. Lafrenaye, F. W. Torrance and J. L. Morris, Montreal.

Lower Canada Reports, Quebec.

Suggestions with reference to the proposed new Act respecting Letters Patent for Invention, by Chas. Legge & Co., Montreal.

Philadelphia Legal Intelligencer. Edited by Henry E. Wallace, No. 607 Sansom Street.

Pittsburgh Legal Journal. Edited by Thos. J. Keenan, 117 Diamond Street.

New York Daily Transcript. Official organ of the Government of the City of New York.

Insurance and Real Estate Journal, New York

CHANCERY SPRING SITTINGS.

The Hon. Vice-Chancellor Mowat.

Toronto	Monday	Mar.	16.

The Hon. the Chancellor.

Goderich	Tuesday	Mar.	31.
Stratford	Friday	April	3.
Sarnia	Tuesday	April	7.
Sandwich	Thursday	April	9.
Chatham	Saturday	April	11.
London	Wednesday	April	15.
Woodstock	Monday	April	20.
Simcoe	Thursday	April	23

The Hon. Vice-Chancellor Mowat.

Guelph	Tuesday	April	7.
Brantford	Tuesday	April	14.
St. Catharines	Thursday	April	16.
Hamilton	Monday	April	27.
Whitby	Monday	May	4.
Cobourg	Thursday	May	7.
Barrie	Monday	May	11.
Owen Sound	Tuesday	May	19.

The Hon. Vice-Chancellor Spragge.

Kingston	Tuesday	April	21.
Brockville	Friday	April	24.
Cornwall	Tuesday	April	28
Ottawa	Tuesday	May	5.
Belleville	Tuesday	May	12.
Peterborough	Tuesday	May	19.
Lindsay	Friday	May	22.

As enquiries are often made by Barristers in the country for gowns and bags, it may be a benefit to them to call their attention to an advertisement, which appears in another place and speaks for itself.

As a rule, the forensic brotherhood is composed of genial, hospitable, jovial men. There have been some notable exceptions. Lord Eldon is often accused of stinginess, and the accusation was too true; yet he gave good dinners, and was very liberal with his choicest port. Lord Kenyon was always penurious, and became excessively so as he grew older. It was said that his domestic servants justly complained "that they were required to consume the same fare as their master deemed sufficient for himself." One wit said, "In Lord Kenyon's house, all the year through, it is Lent in the kitchen, and Passion Week in the parlor." The wine-drinking habits of the eighteenth century, and the first half of the nineteenth, largely infected the legal profession. The brothers Scott (Eldon and Stowell) were occasionally very heavy drinkers of port wine; and it is said of the former that even in his extreme old age he never drank less than three pints of port daily, with or after his dinner. This, too, is among the vices once prevalent in "society," which the greater refinement and self-restraint of modern times have happily all but eradicated. It would be hard now to find a judge who could confess that on the first day of every term he had drunk more than four bottles of wine. This acknowledgment Lord Stowell made to his son-in-law, dismissing the subject with, "more; I mean to say we had more. Now don't ask any more questions."

DIARY FOR FEBRUARY.

1. Sat. .. Clergymen to make yearly return of Marriages to County Registrar.
2. SUN.. *4th Sunday after Epiphany.*
3. Mon.. Hilary Term begins.
5. Wed.. Meeting of Grammar School Boards.
7. Frid... Paper Day Q.B. ; New Trial Day C.P.
8. Sat. .. Paper Day C.P. ; New Trial Day Q.B.
9. SUN.. *Septuagesima Sunday.*
10. Mon.. Paper Day Q.B. ; New Trial Day C.P.
11. Tues.. Paper Day C.P. ; New Trial Day Q.B.
12. Wed.. Paper Day Q.B. ; New Trial Day C.P. Last day for service in County Court.
13. Thurs. Paper Day C.P.
14. Frid.. *St. Valentine.* New Trial Day Q.B.
15. Sat. .. Hilary Term ends. Last day for County Treasurer to furnish to Clerks of Municipalities in counties lists of lands liable to be sold for taxes.
16. SUN.. *Sexagesima Sunday.*
22. Sat. .. Declare for County Court.
23. SUN.. *Quinquagesima Sunday.*
24. Mon.. *St. Matthias.*
25. Tues.. *Shrove Tuesday.*
26. Wed.. *Ash Wednesday.* Appeals from Chancery Cham.
29. Sat. .. Sub-Treasurer of School Moneys to report to County Auditors. School Reports to be made. Superintendent of Separate Schools to give notice to Clerks of Municipalities.

THE

Canada Law Journal.

FEBRUARY, 1868.

MALICIOUS INJURIES TO THE PERSON.

It may be all very true that there are things more precious to man than the safety of his person, or even the preservation of his life, nor do we at present intend to question the truth of this proposition, nor to cavil at this very proper sentiment; but it will scarcely on the other hand be denied, that the right of personal security is not the least of "the absolute rights of every Englishman."

Blackstone, in speaking of the three principal rights of mankind, classes them thus:—1. The right of personal security. 2. The right of personal liberty; and 3. The right of private property. And in particularising what is comprised under the first head he says:—"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." And he further says, that "whatever is done by a man to save either life or member is looked upon as done upon the highest necessity and compulsion."

Now these are views which doubtless most persons are quite prepared to accept without any further reasoning, either by the learned commentator or ourselves, but it is nevertheless, astonishing that so many men have really exceedingly small regard for the enjoyment of the life, limbs, body, health and reputation, of *others*. And here we do not allude to those who maliciously, or in moments of passion inflict injuries, but to those who are appointed by their fellows for the protection of the public in the full enjoyment of those rights.

This is a subject which has lately attracted the attention of some able writers in England, and some of their remarks we have re-produced for the benefit of our readers. The principal ground of complaint there has been the leniency of judges and magistrates in the infliction of sentences for injuries to the person. Complaints of a similar kind have occasionally been made in this country, but it is a different phase of the subject, which has lately directed our attention to it.

Mr. Justice Hagarty, during the recent Assizes for the City of Toronto, in passing sentence on a prisoner who had been found guilty of a common assault, where the evidence was of a most unprovoked and brutal attack with a murderous weapon, deplored the growing tendency of juries to treat the most aggravated and brutal attacks upon men and women as common assaults. In fact it appeared to him, according to their frequent findings, that feloniously stabbing and wounding and half killing a peaceable citizen, was not that which the law of the land looks upon it, a very grave and serious crime, but simply a common assault; the jury thus taking the decision of the law, as well as of the facts, into their own hands.

One of the evil effects of the glaring perversion of justice in the case he alluded to, was not long in shewing itself, for it was only a few days afterwards, that the following scene occurred in the Police Court at Toronto, on an examination into the facts of an aggravated and brutal assault upon an inoffensive old man, from the effect of which he lost the use of his right eye. The close of the case is thus detailed in one of the daily papers:

"Counsel for defence was going to call evidence, when

The Magistrate stated that he was not going to dispose of the case. It was clearly, he said, a case of assault with intent to disfigure or maim; and they have maimed him. It is for a jury to say whether he was accessory either before or

after the fact. His Worship held that the evidence showed Aird to be the principal, and he was therefore responsible for the consequences.

Counsel thought his Worship could dispose of it, as it was only a common assault; he quoted the late assault cases tried in the City Assize Court—a most unfortunate reference.

His Worship said the action of the juries last week in the assault cases, was no rule to go by. These brutal assaults were becoming entirely too numerous of late. He referred to the decided opinions of Judge Hagarty in addressing a jury last week, who, in the case of a peaceable man being dangerously wounded by a loaded stick in the hands of a drunkard, returned a verdict of common assault. He would not like to have been on that jury when his Lordship said—'Thank God, gentlemen, the responsibility of that verdict rests upon you, and not with me.' The action of juries, and especially of such juries, was no guide.

Counsel then asked if bail would be taken.

His Worship said he could not take bail when the evidence was so clear. He would send the evidence over to the County Attorney, where he might succeed in getting an order for bail."

The reference of the counsel for the prisoner to the case at the Assizes was certainly "most unfortunate," and not, by the way, an evidence of very great tact on his part, and it was met as it deserved; and, so far as judges and magistrates are concerned, we may be pretty safe that *they* will not, be guided by what mistaken or stupid jurymen may do. But the evil to be dreaded is of a more serious character, and one likely to spread amongst the masses: — habituating their minds to violence of this kind, and leading them to imagine that the law looks upon depriving a man of the use of his limbs, or members, or destroying his health, as an offence on a par with merely shaking a fist in another's face, or committing a petty larceny; and if this idea once becomes prevalent who can tell what will be the end thereof.

The words put in the mouth of a philosophic detective by a clever novelist, a lawyer, are so apropos, that we may be excused in quoting them. In speaking to a forger he said: "You may smash a man's skull in, so as you don't quite kill him, for twelve months (and for much less since this book was written), but if you forges his name you catches it hot." It has been said that the only way to bring a railway company to a sense of its duties, in protecting the lives and limbs of their passengers, is by the occasional immolation of one of the directors. Perhaps a somewhat similar mode of cure might be beneficial in arresting the malady which occasionally afflicts judges and juries in the matter alluded to.

The evil however is too serious for jesting, and requires that the public should be impressed with a sense of the injurious results arising from the frequent failure of justice in cases where not only personal injuries of a serious nature have been inflicted, but life itself endangered by the hand of some ruffian, whose only punishment is often the mere infliction of a small fine or a temporary imprisonment.

We trust that the remarks of the learned judge, who has thus by his timely and forcible remarks drawn attention to the evil alluded to, will not be thrown away upon those for whom they were intended, and that those whose duty it may be to adjudicate upon crimes of this nature will in future do so with a full appreciation of the right of personal security, one of those rights which are, as Blackstone proudly says, "in a peculiar and emphatical manner the rights of the people of England."

BLUE BOOKS FOR 1866.

Reading blue books is looked upon somewhat in the same light as reading Johnson's Dictionary—instructive, but if anything a little dry. We have never heard of any one whose courage and endurance carried him through a steady perusal from cover to cover, but at the same time valuable and interesting information may always be gathered even from much abused statistics.

We have approached the subject in the hope of presenting to our readers some facts that may interest them, gleaned from the mass of figures before us. The following table we have compiled from the volume of public accounts for the year ending 30th June, 1866, lately received with a number of other books of the same colour.

The County of Halton does not for some reason appear in the returns.

The table is interesting as shewing the amounts received from the sale of stamps used in law proceedings in all the several courts of civil jurisdiction in Upper Canada, and under three distinct heads, viz.: (1) C. F.

or Consolidated Revenue Fund; (2) F. F. or Fee Fund; (3) L. S. or Law Society.

The stamps of the first and third kind (C. F. and L. S.) being used for payment of fees on business done in the Courts of Queen's Bench, Common Pleas, and Court of Chancery. The stamps of the second kind (F. F.) being for payment of fees on business done in the County Courts, Surrogate and other local Courts, and on proceedings under various statutes before the local judges.

Counties.	Con. Rev. F.	Fee Fund.	Law Society.	Total.
Brant	$466 93	$1,370 85	$419 90 =	$2,257 68
Carleton	703 00	1,890 50	386 66 =	2,980 16
Elgin	173 37	471 68	143 45 =	788 50
Essex	116 85	54 63	121 12 =	292 60
Frontenac	495 51	1,233 61	446 33 =	2,175 45
Grey	121 41	1,464 62	83 13 =	1,669 16
Haldimand	114 48	652 47	74 09 =	841 04
Hastings	553 39	1,306 17	366 24 =	2,225 84
Huron and Bruce	480 35	1,827 52	342 47 =	2,600 40
Kent	171 00	707 84	167 68 =	1,046 52
Lambton	207 10	503 50	311 22 =	1,021 82
Lanark and Renfrew	223 11	1,988 56	146 29 =	2,357 96
Lennox and Addington	218 50	1,404 58	137 75 =	1,760 83
Leeds and Grenville	398 53	918 18	242 25 =	1,558 96
Lincoln	278 35	1,298 65	261 25 =	1,838 25
Middlesex	812 25	1,755 13	909 63 =	3,477 01
Norfolk	114 95	720 76	147 73 =	983 44
Northumberland and Durham	579 98	1,679 79	495 23 =	2,754 90
Ontario	181 91	1,279 18	191 91 =	1,653 00
Oxford	237 51	1,247 35	249 37 =	1,734 23
Perth	279 68	1,196 05	308 75 =	1,784 48
Peterboro'	310 17	769 51	264 58 =	1,344 26
Prescott and Russell	40 85	418 72	30 21 =	489 78
Prince Edward	187 15	686 37	133 46 =	1,006 98
Simcoe	275 50	2,682 99	192 85 =	3,151 54
Stormont, Dundas and Glengary	409 00	1,555 16	368 11 =	2,332 27
Victoria	220 40	872 29	194 75 =	1,287 44
Waterloo	101 66	1,049 74	83 60 =	1,235 00
Welland	173 37	525 83	96 90 =	796 10
Wellington	329 65	1,854 40	304 95 =	2,489 00
Wentworth	828 40	1,989 11	847 41 =	3,664 92
York & Peel, including Toronto	19,125 21	6,003 05	6,957 99 =	32,086 25
	$28,879 52	$43,378 79	$15,427 26 =	$87,685 57

The figures in the above table show that the stamps sold, to be used in proceedings in the Superior Courts, amount to $44,306 78, and in the County Courts and other Local Courts to $43,378 79, or in other words that the income derived from business in the Superior Courts exceeds that from the Local and Inferior Courts by $927 99. But in reasoning upon these figures it must be borne in mind that the general revenue is not chargeable with the expense of court accommodations for the County and Inferior Local Courts;—that comes from local sources, whereas the fact is otherwise in respect to the Superior Courts of Common Law and Equity, the L. S. (Law Society) stamp collection being applicable to interest upon and redemption of debentures issued by the Law Society to cover the outlay for extension of buildings, &c., necessary to make the accommodation required for the Superior Courts at Toronto; and consequently the sum of $15,427 26, being wholly applicable to the purpose mentioned, and there being a counter outlay in the Local Courts which is not represented in this table, the sum named should be deducted from the aggregate of $44,306 77, leaving $28,879 52 against $43,378 75, and showing a contribution to the General Revenue Fund by the County and other Local Courts of $14,499 27 more than contributed by the Superior Courts. And the disparity is much greater even than these figures exhibit. For the clerks of County, Surrogate and Division Courts (nearly 300 officers) are all remunerated by fees payable by suitors of these courts in money, while the whole staff of officers in the Superior Courts of law and equity in Toronto, and the several deputy clerks of the Crown, are paid by salary from the general revenue. But this opens a large question, one too extensive for a single article, and we leave it for the present.

A great disparity will be observed in the amount of collections from the different counties; a desparity it is not easy to account for. This is especially noticeable in respect to the Fee Fund stamps for the Local and Inferior Courts. Not to speak of York and Peel, which gives a sum of $6,004 05, there is the County of Simcoe giving $2,682 99, the County of Wentworth, $1,989 11, the County of Waterloo, $1,854 40, or a total for these three counties of $6,526 50, as compared to a total of $976 85 (or one-seventh nearly) for the following three counties, viz.: Essex, $54 63, Prescott and Russell, $418 72, Lambton, $503 50. There has been a great falling off in the business of the courts this last year it is true, but a comparison with similar returns ten years back, and before the stamp law came in force, will exhibit somewhat similar results, viz.: $16,748, as compared to $2,500, (one-seventh nearly) in the year 1857. Thus—

Fee Fund for 1857, shows:

Wentworth	$6,878	.. Essex	$875
Simcoe ...	5,2[illegible]8	.. Prescott & Russell	391
Wellington	4,482	.. Lambton	1,234
	$16,748		$2,500

The statement of the Fee Fund account shows for the whole of Upper Canada a deficit after payment of the salaries of thirty-two County Judges and five Recorders, and $6,400 towards travelling expenses of the County Judges of $47,833 21; and this is the whole deficit, for, as we have already observed, there is nothing left to be paid clerks or other officers. But in other years the fee fund has given a surplus to the general revenue fund. In the year we have already referred to, 1857, there was a surplus of $24,797, contributed by the litigants in the Local Courts (after paying the whole establishment of these courts), to the general revenue of the Province.

So much just now as to law stamps.

The expenses connected with the administration of justice for Upper Canada, as gathered from this volume, would seem to be a large sum, until we come to examine the details, and then it may safely be said that that no public officers are, on the whole, paid with more regard to economy in relation to the amount of work they do (and that work, so far as the judges are concerned of the most exhausting kind), and to the amount of knowledge, intelligence and education required.

The total amount, including the salaries of the county judges already referred to, and all other matters is $340,969.30, classed under the following heads:

For Salaries to Judges of the Courts of Error and Appeal, Queen's Bench, Common Pleas & Chancery	$39,525 35
Salaries to 32 County Court Judges and five Recorders (and including $6,400 allowed for travelling expenses of Judges)	91,131 16
Officers of the Queen's Bench and Common Pleas, and Deputy Clerks of the Crown, and contingencies	26,421 57
Officers of the Court of Chancery and contingencies (including the salary of the Surrogate clerk)	14,008 40
Court of Impeachment (salary of clerk)	200 00
Circuit allowances (common law and equity)	11,200 00
Criminal prosecutions (paid to 40 crown counsel)	10,725 85
Administration of Criminal Justice (amounts paid by Treasurers, &c.)	128,646 89
Miscellaneous items (being principally for the administration of criminal justice and crown suits and prosecutions)	19,101 83

Of course it is impossible to say exactly how much of the total sum is for the administration of criminal justice, but it will easily be seen that a large proportion of the expenditure is for that purpose. Besides the last three items, which have particular reference to the administration of criminal justice, a share of the salaries of the judges of the Queen's Bench, Common Pleas, and the judges of the County Courts as chairmen of the Quarter Sessions and Recorders, and the salaries of the officers of these courts must be charged to the administration of criminal justice. The expenses of the Penitentiary, Reformatories and Prison Inspectors ($190,748 50, less the receipts from Penitentiary and Reformatories, $47,707 69, leaving a balance of $143,040 81), are also of the same nature.

It is curious to compare the figures that to a certain, though very imperfect manner represent the civil and criminal business in the different counties, and to make this more clear we subjoin a statement of the amounts paid to the Treasurers of the different counties for criminal justice:

Brant,	from June, 1865,	to March, 1866		$6,750 01
Carleton,	"	"	"	4,268 99
Elgin,	"	"	Dec. 1865..	4,228 97
Essex,	"	"	March, 1866	2,907 86
Frontenac,	"	"	"	4,434 60
Grey,	"	"	"	3,252 33
Haldimand	"	"	"	2,790 61
Halton,	"	"	Dec, 1865..	1,619 76
Hastings,	"	"	March, 1866	3,298 46

Huron and Bruce,	"	"	4,513 04
Kent,	"	"	1,910 73
Lambton,	"	"	3,228 48
Lanark and Renfrew,	"	"	3,604 19
Lennox & Addington	"	"	2,243 96
Lincoln,	"	"	3,985 74
Leeds and Grenville,	"	"	3,780 36
Middlesex,	"	"	8,362 64
Norfolk,	"	"	3,367 65
Northumberland,	"	"	4,688 54
Ontario,	"	"	2,402 27
Oxford,	"	"	3,242 13
Perth,	"	"	3,458 85
Peterboro',	"	"	1,081 75
Prescott and Russell,	"	"	926 54
Prince Edward,	"	"	1,461 19
Simcoe,	"	Dec. 1865..	3,202 43
Stormont, Dundas & Glengary ...	"	"	4,433 79
Toronto,	"	Dec. 1865 & balance for Dec. sessions, 1864.....	6,866 64
Victoria, from June, 1865, to March, '66			2,189 42
Waterloo, from Sept.	"	"	3,524 98
Welland, from June	"	"	3,610 00
Wellington,	"	"	3,191 36
Wentworth,	"	"	5,706 25
York and Peel,	"	Dec. 1865..	3,350 25
"		March Sessions, 1866	1,312 09
Total.....			$128,646 89

For example, we have seen that the total yield of stamps in the County of Essex was $292 60, whilst the amount paid to the Treasurer of that county for the expenses of criminal justice, was $2,907 86. Compare these figures with the relative returns for the County of Kent, which shew $1,046 52, from stamps, and $1,910 73, for criminal justice. Again, compare Elgin with $788 from stamps, and about $5,000 for criminal justice, with the relative figures of $1,344 26 and $1,081 75, from the County of Peterboro', where the proportion is reversed.

The administration of justice in Lower Canada for 1866 is given at a total of $398,594 19, and therefore considerably exceed that of Upper Canada, which, as we have seen was $340,969 30 for the same period.

We might perhaps be allowed to exercise the birthright of every true Englishman namely, and grumble at this disproportion, particularly as some of the items which swell the larger amount are made up of sums which with us would be paid by municipal corporations, &c., and appear in another place. We may at least, however, hug ourselves with the idea, that we get at least as good worth for our money as our brethren to the east of the Ottawa.

On looking at the "Year Book," for 1868, we find that the "Judiciary Expenses" in Nova Scotia, for the year 1866, are set down at $6,130; and the "Administration of Justice" in New Brunswick, at $22,888. Now as the ordinary expenditure of the four provinces were, for the year preceding their union, Ontario and Quebec, $11,957,053; Nova Scotia, $1,920,434; and New Brunswick, $1,349,701, it would seem pretty clear that the figures which would at first sight appear to shew the relative expenses attendant upon the administration of justice in the four provinces, do not in themselves give a correct idea of the comparative amounts, and it is probable that in Nova Scotia at least, items which in the other provinces are placed under this head, are there included under some other general heading; but not having the details from Nova Scotia and New Brunswick before us, we cannot speak at all definitely on this part of the subject. It may be seen, however, from a statement published on the 4th of this month for the use of the Legislature, of the revenue and expenditure of the Provinces from the 1st July to 30th November last, that these expenses are nearly the same in Nova Scotia and New Brnnswick for that period, namely, $5,002 51 and $5,192 00 respectively.

The expenses connected with the codification of the laws of the Lower Canada were, $31,222 87—the printing and distribution of the statutes came to $18,703 78; whilst the total "Expenses of the Legislature," in which are included the above items and all expenses of both Houses, and other items for election expenses, &c., amount to within $86 of the total amount paid for the administration of justice in Lower Canada, being $398,508 94.

ACTION FOR DIVIDENDS.

We draw attention to a late decision under the Insolvent Act, by His Honor Judge Macdonald, of Wellington. It is a subject with which he is familiar, and he is thoroughly competent to express an opinion upon it and the point is in itself interesting and important.

An action was brought by a creditor against the assignee of the insolvent for a dividend on a claim which had been collocated by the assignee and advertised, but unobjected to by any one. It was objected that the assignee could not be sued for a dividend, but the learned judge held that the action could be maintained.

A great disparity will be observed in the amount of collections from the different counties; a desparity it is not easy to account for. This is especially noticeable in respect to the Fee Fund stamps for the Local and Inferior Courts. Not to speak of York and Peel, which gives a sum of $6,004 05, there is the County of Simcoe giving $2,682 99, the County of Wentworth, $1,989 11, the County of Waterloo, $1,854 40, or a total for these three counties of $6,526 50, as compared to a total of $976 85 (or one-seventh nearly) for the following three counties, viz.: Essex, $54 63, Prescott and Russell, $418 72, Lambton, $503 50. There has been a great falling off in the business of the courts this last year it is true, but a comparison with similar returns ten years back, and before the stamp law came in force, will exhibit somewhat similar results, viz.: $16,748, as compared to $2,500, (one-seventh nearly) in the year 1857. Thus—

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The total amount, including the salaries of the county judges already referred to, and all other matters is $340,969.30, classed under the following heads:

For Salaries to Judges of the Courts of Error and Appeal, Queen's Bench, Common Pleas & Chancery	$89,525 33
Salaries to 32 County Court Judges and five Recorders (and including $6,400 allowed for travelling expenses of Judges)	91,131 16
Officers of the Queen's Bench and Common Pleas, and Deputy Clerks of the Crown, and contingencies	26,421 57
Officers of the Court of Chancery and contingencies (including the salary of the Surrogate clerk)	14,008 40
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Circuit allowances (common law and equity)	11,200 00
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Grey,	"	"	"	3,253 33
Haldimand	"	"	"	2,790 61
Halton,	"	"	Dec, 1865	1,619 76
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Lambton,	"	"	3,228 48
Lanark and Renfrew,	"	"	3,604 19
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Leeds and Grenville,	"	"	3,780 36
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Norfolk,	"	"	3,367 65
Northumberland,	"	"	4,688 54
Ontario,	"	"	2,402 27
Oxford,	"	"	3,242 13
Perth,	"	"	3,458 85
Peterboro',	"	"	1,081 75
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Prince Edward,	"	"	1,461 19
Simcoe,	"	Dec. 1865..	3,202 43
Stormont, Dundas & Glengary ...	"	"	4,433 79
Toronto,	"	Dec. 1865 & balance for Dec. sessions, 1864.....	6,866 64
Victoria, from June, 1865, to March, '66			2,189 42
Waterloo, from Sept.	"	"	3,524 98
Welland, from June	"	"	3,610 00
Wellington,	"	"	3,191 36
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Salaries to 32 County Court Judges and five Recorders (and including $6,400 allowed for travelling expenses of Judges)	91,131 16
Officers of the Queen's Bench and Common Pleas, and Deputy Clerks of the Crown, and contingencies	26,421 57
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LAW SOCIETY—HILARY TERM, 1868.

CALLS TO THE BAR.

The following are the names of the gentlemen who passed examination for call to the bar, and for admission to practice, in the order in which the examiners placed them, according to their marks.

T. S. Kennedy, Toronto; E. Meredith, London; P. McNulty, Belleville; C. McFayden, Owen Sound; F. E. Burnham, Peterboro'; W. H. Lowe, Bowmanville; W. Mosgrove, Ottawa.

Mr. Kennedy without an oral examination.

ADMISSIONS AS ATTORNEYS.

W. Mulock, Toronto; W. R. Squier, Toronto; A. Dent, Woodstock; P. McNulty, Belleville; N. M. Munroe, Cornwall; F. E. Burnham, Peterboro; E. Meredith. London; H. J. Finkle, Woodstock; J. McCosh, Paris; E. R. Fraleck, Belleville; Colin Macdougall, St. Thomas; R. H. Smith, Woodstock; J. Butterfield, L'Original; D. Scott, Brampton.

Messrs. Mulock, Squier and Dent without an oral examination.

DEATH OF JUDGE SALMON.

We have to record the death of Mr. Salmon, Judge of the County Court of the County of Norfolk, on the 8th instant, aged 63. He was appointed on 26th May, 1845, under Lord Metcalfe's administration.

JUDGMENTS.

ERROR AND APPEAL.

Present—The nine Judges.

Saturday, February 1, 1867.

Widder v. *Buffalo and Lake Huron Railway Co.*—Appeal from Court of Queen's Bench dismissed without costs, and new trial granted without costs.

Thorne v. *Torrance.*—Appeal from Court of Common Pleas dismissed with costs. Adam Wilson, J., dissenting.

Mutchmore v. *Davis.*—Appeal from Court of Chancery dismissed with costs. Adam Wilson, J., and Mowat, V. C., dissenting.

QUEEN'S BENCH.

Present—Draper, C. J.; Hagarty J.; Morrison, J.

Monday, February 3, 1868.

Cummings v. *Elliot.*—Rule absolute for new trial, costs to abide the event.

Clark v. *Corbett.*—Postea to defendant.

Calvin v. *Provincial Insurance Co.*—Rule absolute to enter nonsuit.

Noble v. *Spencer.*—Rule absolute for new trial without costs.

Fawcett v. *London and Liverpool Insurance Co.*—Rule discharged.

Fields v. *Miller.*—Rule discharged.

Smith v. *Morton.*—Rule discharged.

White v. *Dunlop.*—Rule discharged.

Kerr v. *McEwan.*—Rule discharged. Leave to appeal granted.

Fisher v. *Grace.*—Rule absolute for new trial without costs.

Peck v. *McDougall*—Judgment for defendant on demurrer.

Adams et al. v. *Clark et al.*—Rule discharged.

Deadman v. *Ewan. In re Henry McPherson, Judge of Co Grey.*—Rule absolute for writ of attachment, unless costs paid within a month.

Gourlay v. *Gourlay.*—Rule absolute to set aside judgment without costs.

Morgan v. *Sabourin.*—Rule discharged. Leave to appeal granted.

In re ——— *Gentleman, one, &c*—Fined five dollars, and to pay costs of application.

Walmsley v. *Walmsley.*—Rule to set aside verdict for tenant, and to enter a verdict for demandant.

Present—Hagarty, J.; Morrison, J. (the Chief Justice being absent from indisposition)

Saturday, Feb 15, 1868.

Great Western Railway Co. v. *Rogers*—Replevin. Judgment for the defendant, on demurrer.

Thompson v. *Rutherford.*—Appeal from County Court of Waterloo. A final discharge by a County Judge under Insolvent Act, if not appealed against, and if no fraud or corrupt bargain in obtaining it, is a final bar; but if there be, it is no bar. Appeal dismissed, with costs.

Cain v. *Lancashire Insurance Co.*—Judgment for defendants, on demurrer.

Althouse v. *Haensgen.*—New trial on payment of costs in three weeks from end of Term.

Mellen v. *Nicolls.*—An insolvent was a foreigner; and the question was, whether the Insolvent Acts applied to him; but the court, feeling a reluctance to decide this, on motion, suggested a mode of bringing the point properly before the court. Defendant to have two weeks further time to plead.

Bank of British North America v. *Baxter.*—New trial on payment of costs, on condition of defendant giving security for $1,000.

Re Iredale.—Rule refused.

Present—Richards, C. J.; A. Wilson, J.; J. Wilson, J.

Tuesday, Feb. 4, 1868.

Pennymore v. *McGrogan.*—Stands at present.

McGregor v. *Calcutt.*—Rule discharged.

City of Hamilton v. *Morrison.*—Rule discharged.

Walsh v. *Brown.*—Stands at present.

Woods v. *Rankin.*—Appeal allowed. Court below to issue a rule for new trial, without costs.

Tiffany v. *Bullen.*—Rule absolute, without costs. *Held,* that the affidavit to found a garnishing order must be made by the judgment creditor or his attorney. An affidavit by an agent insufficient.

Welsh v. *Leaky.*—Judgment for defendant on demurrer.

Hyland v. *Scott.*—Rule discharged, with costs.

Gore Bank v. *Mc Whirter.*—Rule discharged

Forgie v. *Reynolds.*—Rule discharged.

COMMON PLEAS.

Present—Richards, C. J., C. P.; Adam Wilson, J.; John Wilson, J.

Saturday, February 15, 1868.

Winckler (administrator) v. *Great Western Railway Co.*—Rule absolute to enter non-suit.

Winckler v. *Great Western Railway Co.*—Rule absolute for non-suit without costs.

Cline v. *Great Western Railway Co*—Rule refused. Leave to appeal allowed in these three cases.

Hope v. *White.*—Stands.

Mc Whirter v. *Learmouth.*—Appeal from County Court dismissed with costs.

Laur v. *White.*—New trial, with costs to abide event

Ball v. *Town of Niagara.*—Stands.

Ball v. *Town of Niagara.*—Stands.

Hopkins v. *Provincial Insurance Co.*—New trial without costs.

McDougall v. *Covert.*—Rule discharged.

SELECTIONS.

OUR JUDGES, OUR PERSONS, AND OUR PURSES.

If the judge is to be a terror to evil-doers the administration of the criminal law must be vigorous, effective, and consistent. The latter property is perhaps the most important, and indeed the most excellently framed law loses all efficacy when inconsistently administered.

Common sense and common law agree in the principles regulating the penalties against life and limb, and crimes against mere inert property. Coke, Hale, and Blackstone all recognize the superiority of the former's claim to protection, and such claim was recognized by the ancient Anglo-Saxon code. Property may be recovered or reinstated in validity; life never can, and limbs but seldom if ever in their pristine vigour. It is in highest degree essential that health and strength of body and members, the health and strength on which depends the acquisition of property, should be guarded with the greatest vigilance, and all injuries to them punished with the sternest and sharpest retribution. And if the reader is astonished at the enunciation of such trite truths, such mere elementary truisms, a perusal of many cases lately adjudicated on in the criminal courts will remove all cause for astonishment, and prove the need there is that some of our judicial functionaries should be awakened from the lethargy or hallucinations respecting the several rights of person and property into which they have fallen.

The evil of leniency in cases of injury to the person is one of those that has attained enormous proportion of late. It is one whose fruits are seen in the savage assaults and bloody affrays which must be checked, if it need be, by the bitterest pains of servitude and the lash. The next Session of Parliament will not have fulfilled all its duties if it ends without the enactment of a brief measure, fixing severer punishments for specified acts of violence. What such an Act should be will presently be shown.

Here let us consider the present code of criminal law and the various cases of misplaced "discretion" which are culled from a file of newspapers. They deserve the most earnest consideration from every judge and member of Parliament who may happen to see them, and their lamentable effect is to produce that curse to any system of law—*a belief in its hazards and its chances as dependent on individual administrators.*

The Consolidation Act, 24 & 25 Vic. cap. 100, is the present code regulating the punishment dealt out by the law of England to the commission of crimes against the person. The annexed table shows the penalties attached to the different species of violence which it is the aim of this paper to discuss.

Summary Convictions.

Common assault.....	£5 fine or two months' hard labour.
Aggravated assault on women.....	£20 fine or six months' hard labour.

Indictable Offences.

Grevious bodily harm..	Penal servitude for life.
Common assault.....	12 months' imprisonment.

Now there is no exaggeration in saying that dozens of cases are adjudicated on by magistrates under the first of these two headings which ought to be tried under the second. And, when so adjudicated, not even the full summary penalty,—often not even half of it—is inflicted. Indeed, it is enough to provoke the most phlegmatic person into anger, to see the kind of apathy with which some of the London magistrates regard the cases of assault brought before them, and the ridiculously slight fines with which they punish them. The larceny of petty articles is visited with months of hard labour, while (to give instances reported in the newspapers) knocking a womans's tooth out and cutting her face, pulling a handful of hair out by the roots, indecently assaulting a servant, striking a woman with a rake in the face, and wounding her that she faints, and

other similar brutalities, have all been punished of late by the infliction of trumpery fines.

What is the consequence?—The savage spirit animating the ruffianism of London, and fostered by the Forcible Feebles at some of the courts, has full swing. Eyes blackned, noses broken, ears bitten off, frightful wounds, contusions, and locerations are the fruits of the magisterial leniency. One magistrate in particular seems, since his appointment, to be utterly blind and deaf to the complaints made for mere bodily injuries. In his court have been reported shocking assaults, not one of which has been visited with that bitter imprisonment which alone cures brutality.

Is it that the air of a London magistrate's has some enervating effect? Are the scenes and instances of shameful assaults and savage ferocity so numerous as to deaden the magisterial sensibility? Why is not the two months' penalty rigidly enforced in every assault where any bodily disfigurement or laceration—aye, be it the slightest—results, and why is not a minium of fourteen days given to every other proved savage attack? *Because the magistrates forget the precious value of limb and bone while perceiving that of watches and purses.!*

Of the strange perversity of judgement in this matter, which distinguishes many of the London magistrates, enough has been said in a former number, under the title "Crimes of Violence and their Punishment." Rather is it intended in this paper to point out the pernicious leniency which extends to some courts of far higher than Metopolitan police courts. Not merely at the Middlesex Sessions have have the heavy sentences passed off for offences against property, and the light ones for offences against the person. A sentence of four months for manslaughter with the knife was passed by an eminent judge not long since. Such a manslaughter is divided by the thinnest line from murder, and how paltry does it seem when compared with the heavy sentences of penal servitude inflicted at every assize and quarter sessions for robberies of articles of property.

Manslaughter, rape, assaults with intent, infliction of grevious bodily harm, and assaults resulting in *any* personal mutilation, ought by every rule of common sense to meet with most exemplary punishment. Yet they only seem to rank, in the minds of many administrators of the criminal law, with robberies, thefts, and forgeries, and generally *below* these last in heniousness. A lamentable perversion of judgment this, and most terrible in its consequences. The brutal violence of our English savages is, in effect, a result more or less of a pernicious idea that the person may be injured with little risk, while the pocket is guarded by the most terrible rigour of the law. Unless this idea is forthwith exploded by the infliction of very heavy punishment (with no remission) for violence, the lawlessness which has temporarily grown up among the dangerous classes will have terrible results. Already rowdyism and ferocity seem to have infected the mobs in many places in an unusual degree, and the sooner the lesson is taught that the Law is above all in England, the better for everyone's welfare.

Property is as nothing compared with life and limb. Who does not regard the robber of his watch as a far less culpable offender than the villian who stabs or beats him to death's door. The sharp sting of the lash, the terrors of the hulks, and the rigour of prison life are the only fit reprisals for crimes of brutal violence committed for mere savagery and love of inflicting pain. The wife beater, the villains who offer violence to women, the smashers of bones with pokers and hobnailed boots, the cannibals who bite off ears and noses, the ruffians who use quart pots as lethal weapons, and the vitriol throwers, are the worst criminals in England. By their side, the shoplifter, the watch stealer, the pickpocket, and the swindler are trifling offenders. And until the judges and the magistrates adopt this classification, we shall continue to shudder and sicken at the devilish brutality and cruelty which crop up at every gaol delivery.

It cannot be denied that the London stipendiary magistrates have done much, by their leniency towards mere acts of violence, in deadening the minds of criminals towards the nature of ruffianism; and one or two whom we could name, to judge from the *Times* reports of their courts, to show the most ridiculous ignorance of their functions as repressive agents of brutality as well as of theft. At one court several savage assaults have been punished with trumpery fines. It makes one regret that the option of a fine was ever retained in the 42nd section of the 24 & 25 Vic. c. 100, which rules common assaults. It is a source of miserable weakness in some magisterial decisions.

The moment the dreadful theory gains distinct shape, that the integrity of life and limb are little valued by the law, all security and cohesion of society ceases. Mercy, or rather weakness. in such cases is very cruel to the criminal classes as well as to their victims, because sooner or later it engenders a fierce and pitiless reaction; and more than that, leniency to offences of this class intensifies more than ever the commercial taint which runs so much through English law. Every consideration must point towards the far severer punishment of offences against person than of those against property.

What then are the suggestions for ameliorating the misplaced lenity which sows such dragon's teeth:—

1. (As before advised) a circular from the Home Office pointing out the imprisoning powers of the Act regulating offences against the person. This applies to magistrates' courts only.

2. A short and tersely drawn Act, punishing every common assault with any *wilful*

mutilation with a maximum two years hard labour, and in the case of a male, twenty lashes. Committal for trial *peremptory*.

3. Intensified punishments on proof of previous convictions for assaults.

Severity is needed. The lash has been so admirable a medicine for the disease of garotting, that we cannot doubt its efficacy in that of the brutal assault and battery. *And the lash has terrors for the brute.* Let a little consideration for the wives beaten almost to death, and the bitten, smashed, and kicked victims temper the philantrophy which looks after the perpretators and shudders at the cato-nine tail's name.

To sum up the events of the case briefly, it is only necessary to reiterate that property can be fully reinstated; life, limbs, and teeth cannot. Attacks on the purse injure the bankbook, attacks on the body injure the constitution; and while offences against property shorten only the assets, attacks on the person often shorten life.

One word more. Every proved assault, either with intent or indecent, and every proved rape, ought to meet with the full terms of punishment. Nothing more demonstrates a weakness in a State than the insecurity of its women's safety, and nothing can be a bitterer satire on civilization than to see women unable to walk alone on the high road.

The sooner the judges, chairmen of Quarter Sessions, and magistrates decide on punishing greivously all crimes of unredeemed brutality the better for our national character and our social and individual safety. Not only for our own benefits but for those of the weak and defenceless in the lowest classes in the great town, ought we swiftly, sternly, and surely to teach the lesson that all violence ensures the heaviest retribution from the law. Impossible it is to overrate the importance of such a lesson, and it is earnestly hoped that the considerations imperfectly pointed out in this paper may at once find some place in the minds of those who have the great and awful responsibility of the just administration of the criminal law.

William Reade.

PROFIT COSTS of SOLICITOR MORTGAGEE WHO ACTS ON HIS OWN BEHALF.

In *Sclater* v. *Cottam*, apparently a suit to carry the trusts of a settlement in execution, 5 W. R. 744, 3 Jur. N. S. 630, Vice-Chancellor Kindersley refused to allow the mortgagee of a life estate under the settlement, and who had acted as his own solicitor, the costs which he had incurred in defending his title other than costs out of pocket. The Vice-Chancellor observed "Now, one principle is, that the mortgagee is entitled, as between him and the mortgagor, to have taken into account, on a suit to redeem, any costs which he has incurrred in protecting his title to the mortgaged property. Another principle is that the mortgagee, though he may be entitled to certain expenses properly incurred in relation to the mortgaged property, as the expenses of employing a collector, cannot himself charge for his own trouble. For instance, he may employ a collector, but if he himself takes the trouble of doing it, although it would not be a greater burthen to allow him the remuneration, the principle is, that he shall not be allowed it in his accounts. Putting these two principles together, my opinion is, that I must come to the conclusion that the certificate of the chief clerk is right, and that these costs cannot be allowed."

From the statement of the case, it seems that the mortgagee had under his security been in receipt of rents amounting to £1,100, from which he claimed to deduct, among other moneys, his costs, including profit costs, and it is observable that a mortgagee in possession is constructively a trustee of the rents and profits which he receives (see Lewin, p. 155); but, as the Vice-Chancellor observes, "it is not the same as the case of a trustee being allowed (query disallowed?) his costs," it may be questionable whether he rested his decision on the mortgagee's possession.

In *Price* v. *McBeth*, 12 W. R. 818, 10 Jur. N. S. 579, a puisne mortgagee filed his bill against the prior mortgagees and the mortgagor for redemption and foreclosure. A decree was made in the useful form, directing an account of what was due to the prior mortgagees for principal interest and the costs of their suit. They had not however been in possession of the mortgaged property. On taxation, the plaintiff objected that they ought not to be allowed profit costs, but the taxing-master allowed them *the same costs as he would have allowed them if they had employed other solicitors to act for them.*

Mr. Wainwright, the taxing-master, in his reason for decision, stated, that a solicitor acting for himself, as plaintiff or defendant in a suit, had always been allowed his profit costs as if he had acted for others, except in the case of a a solicitor acting for himself as trustee; that a mortgagee, until he was repaid, was not a trustee, but a creditor; that, up to the case of *Sclater* v. *Cottam*, (*ubi sup*)., the cases in which a mortgagee was not allowed to charge for his time and trouble, seemed to have been cases of a mortgagee in possession receiving his own rents, and doing his own business as other individuals might do, and seemed not to have applied to the privilege of a solicitor acting for himself in a suit, and charging his fees in that suit. In *Sclater* v. *Cottam* the decision was not that the solicitor-mortgagee should not have his profit costs in that suit, but that he should not have profit costs for defending two other suits, which costs he claimed in the nature of just allowances to him as a mortgagee.

A motion was made on behalf of the plaintiff that the taxing-master might be ordered to review his taxation. The items to which o b

jection was taken were "all such items as either wholly or partially had been allowed," whereby the prior mortgagees would derive any pecuniary profit over and above the money out of pocket.

Vice-Chancelor Stuart stated that he did not intend to decide *whether* or not a solicitor as mortgagee in a suit for redemption and acting for himself; was as a matter of course to have his ordinary full costs of the suit; that was a question to be decided *at the hearing*. If any reason could be suggested why a solicitor's costs should be merely costs out of pocket, it ought then to be stated and the decree ought so to direct, but as the decree in question had not done so, he held that the taxing-master was "bound to proceed in the usual manner, and ought not to take upon himself the trial of questions which went beyond the decree. The Vice-Chancellor therefore refused the motion, without costs.

In Morgan & Davey's Costs in Chancery, p. 283, the authors, after citing *Price* v. *McBeth*, add, "but see *ante*, p. 281," apparently referring to *Cradock* v. *Piper*, 1 M. & G. 664, there cited, as if it were inconsistent with the ruling in the former case. In *Cradock* v. *Piper*, 1 M. & G. 664, there cited, as if it were inconsistant with the ruling in the former case. In *Cradock* v. *Piper*, Lord Cottenham, C. had held (contrary to his impresssion, see p. 675) that under an order to tax costs generally or to tax costs as between solicitor and client, the taxing masters were at liberty to take notice of the fact that the solicitor is also a trustee, and accordingly in that case to disallow costs, except those out of pocket. His Lordship, however, founded his conclusion on the *practice* of the taxing-master, and even then he thought that there was "a little difficulty in reconciling so large a discretion with what appeared to him to be its proper and legitimate exercise." See p. 676. The inference from *Cradock* v. *Piper* would rather seem to be, that the *practice* in the taxing-master's office has a very material bearing on the question. It is noticeable, that in *Selater* v. *Cottam*, no reference appears to have been made to this practice.

We understand the practice of the taxing-master's office to be—that a solicitor-mortgagee is allowed his costs of suit (coinciding with the rule laid down by Master Wainwright), and this exception to the usual rule, that a party suing in person is entitled only to charge costs out of pocket, may be justified as well on the ground of public policy as upon the principle that a solicitor, as an officer of the Court of Chancery, is, by virtue of his privilege as such, entitled to his fees. Upon general grounds it is certainly advisable that a solicitor-mortgagee should be allowed his profit costs. If this were otherwise, the inevitable result must be either that he would complicate matters by taking the security in the name of a third party (so as not to disclose the fact that he, the solicitor, was himself the real lender), or else he would employ some other solicitor at a possibly increased expense, inasmuch as the previous knowledge possessed by another solicitor of the title and circumstances of the mortgaged property would probably be less than that of the solicitor, mortgagee himself. Hence it may well be for the mortgagee's own advantage, that this rule should be followed, and this the rather as the costs can be taxed; and the taxing-master would doubtless be ready to tax as strictly when the mortgagee was *his own* solicitor as when he acted by *another*.

The question we have been noticing has been frequently raised of late in the taxing-masters offices, but in no case has it been adjourned into court. At present the practice may be taken to be as we have said, and we believe the present practice to be the best for all parties. The subject is certainly an important one to the profession.

A BOOK ABOUT LAWYERS.*

This is verily the gossip of the bar. Lawyers pass their lives in discussing the affairs of others: here there own are minuted. The legal profession entails upon its members an intimated knowledge of the virtues, the vices, the foibles, the weaknesses, the habits, at home and abroad, of the rest of the world. They are even called on to become familiar with the little peculiarities and eccentricities of laymen, who come to them for advice, and intrust to them their family secrets,—who, unlocking their closets, invite an inspection of the skeletons within. Now, the profession, of course, has no skeletons; for it is forced to see so many belonging to others, that it finds better things to lock up, whether in its closets at home, or safes at the office: but it has its history, little as well as great, with a strong and a weak side; and little, odd nooks and corners and by-ways, alleys and back doors, as well as the great, broad stone front of solid grandeur and respectability, which it presents to an admiring public. Mr. Jeaffreson has chosen to make these smaller matters the subject of his book. The title-page tells us he is a "barrister-at-law:" whether he has attempted greater themes, and so Apollo, pinching his ear, has admonished him, and sent him to his humbler page, we know not. Enough to say, he has treated this subject quite cleverly, and has managed to fill two volumes, of nearly four hundred pages each, with entertaining and amusing talk about English lawyers. They are presented in almost every conceivable circumstance, from the cradle to the grave. "Lawyers in Arms" is the title of one of his chapters; and such is the comprehensiveness of the work, that one is rather surprised to find, that it is the arms of Mars, and not those of Lucina, that are referred to. Lawyers in the bar and on the bench, on foot and in the saddle, at home and abroad,

* By John Cordy Jeaffreson, Barrister-at-Law. In two volumes. London: Hurst and Blackett. 1867.

at their tables, in their chambers, in the House of Commons; lawyers in love, lawyers on the stage, married lawyers, henpecked lawyers; lawyers pleading, singing, fighting, jesting, dying. We are even told what they wore, what they ate and drank, when they rose, and when they went to bed. A curious entertainment this. The muse is not great and high and inspiring. There are no battles, and statemanship, and things of nations; less heroic, perhaps because the sight is from a valet-de-chambre's standpoint. Those with the fine black eyes and full-bottomed wigs, have removed these tedious coverings with their flowing robes, or perhaps their collars of ss. My Lord High Chancellor Eldon becomes "handsome Jack Scott," and elopes with pretty Miss Bessie Surtees, of Newcastle. Lord Thurlow is no longer the savage old peer, with overhanging white eyebrows, giving from the woolsack that justly celebrated democratic reproof to the Duke of Grafton, which American schoolboys delight to declaim; but "lazy, keen-eyed, loquacious Ned Thurlow," perplexed where to find a horse on which to ride his first circuit, taking the animal on trial, riding him the circuit, and returning him on its completion, "because the animal, notwithstanding some good points, did not altogether suit him."

So Mr. Jeaffreson leads the reader through the book. The chapters are aptly designated; and, if one topic tires, the reader can skip to another, or, taking up the book at any point, cannot fail to find much that is clever, curious, and amusing. For let us be as studious as we may of the dignity of history, and let our reverence for the fountain-heads and sages of the law be however so deep, there is for all this a lurking—nay, rather an eager—curiosity to know what clothes these fine historic personages wore, what wine they liked best, how their wives treated them, and how many dollars or pounds they left behind to their descendants. Is gossip any the less amusing because it is of the great? Rather the contrary; and the appetite increases in proportion as its subject is higher in the world. Let others give the philosophical reason for this. Suffice it for the present that the fact exists; and that those students who have pored with diligence over the learned judgments of Mansfield and Ellenborough,, and read with admiration the eloquence of Erskine, will be none the less likely to be amused by a narrative of the dress, the manners, the foibles, or the wit of these great lawyers.

Anecdotes of the bench and bar have been published in considerable numbers before this. Lord Campbell's works on the Lord Chancellors and Chief Justices abound with them. The author of "Law and Lawyers," Mr. Polson, has given many; and they are to be found strewn here and there through the memoirs of the distinguished men and histories of the periods; but it is thought that there has been nowhere so full, so well assorted, and so readable a collection as that of Mr. Jeaffreson. As a matter of course, there is much to be found here that is by no means new, and not a little that is familiar, and almost hackneyed. Still this is necessary, from the nature of the book; for, in a work that pretends to completeness, the omission of these familiar histories would detract from its value, and constitute a serious defect. For one who desires an agreeably written compendium of the familiar life and manners of English lawyers of the past, there is no more readable book than the one "at bar."

While this "Book about Lawyers" contains some topics of a local nature which the English profession would feel more essentially its own, there are many matters which are calculated to give it a peculiar interest to the American lawyer. The separation for two centuries of our courts from those of the mother country, one of which has been that of divorce, together with the dissimilar natures of institutions and society, has produced in the courts and professions essential difference of practice and etiquette. Our early colonial courts were modelled on the English; our early lawyers were bred in the English inns. The English courts were their models in practice. Where, then, is the change? Not, as one might think, entirely in the new, but in the mother country. Mr. James Russel Lowell, in the preface to his "Biglow Papers," has conclusively shown, that a very large number of words and phrases, which are commonly regarded as provincial Yankeeisms, are in fact of ancient English origin, from which the modern English speech has varied, and which are preserved in this country in the true vernacular form. Indeed, any one in the habit of reading the older English poets, and especially Spenser, will readily observe how often he happens upon phrases which he has hitherto thought the native fruit of "down East." So the student of the ancient customs of the English profession will find in them quite as many resemblances to American, as to modern English, practice and etiquette. To give some of these. It is the leading principle of English professional etiquette, that the client must consult the barrister only through the medium of an attorney; but in the days of Sir Matthew Hale, and even afterwards, this was far from being the case. At this time clients were in the habit of addressing their counsel personally, and taking their advice; and, in the seventeenth century, almost always insisted on having personal interviews; and though their attorney or solicitors usually conducted them to the counsel's chambers, and were present during the conference, no member of the inferior branch of the profession deemed himself affronted or ill used if a client chose to confer with his advocate without the presence of a third person. Long, too, in the eighteenth century, barristers were in the habit of acting without the co-operation of attorneys, in cases where no process required the employment of the latter. "They were accustomed," says Mr. Jeaffreson, "to receive

their lay clients in the coffee-houses fast by Westminster Hall and Inns of Court; just as the eighteenth century physician used to sit at an appointed hour of each day in his public coffee-room, and write prescriptions for such patients as came to consult him, while he drank his wine." The reader will recollect, that, in one of the series of Hogarth's pictures of "Marriage à la Mode," the young barrister, afterwards the lover and seducer of the wife, sits by and superintends the execution of the marriage-settlement: an office which professional etiquette would debar an English barrister from performing at the present time. So, too, as to interviews with the witnesses, whose testimony the English lawyer of the present day knows only from his brief. Roger North says he has heard Sergeant Maynard say, that "no attorney made breviate of more than the pleadings, but that the counsel themselves perused and note the evidences,—if deeds, by perusing them in his chamber; if witnesses, by examining them there also before the trial: and so," North very sensibly remarks, "were never deceived in the expected evidence, as now the contrary happens; the evidence seldom or never comes up to the brief, and counsel are forced to ask which is the best witness. But the abatement of such industry and exactness, with a laziness also, or rather superciliousness, whereby the practice of law forms is slighted by counsel, the business, of course, falls into the hands of attornies."

Fees and retainers, also, which it is now unprofessional in England to receive directly from the client, were, in Sir Matthew Hale's time, paid to the barrister from the client's own hand. Indeed, the modern English fashion, strictly subdividing legal labor and controlling the relation of lawyers and clients, did not come into vogue until the latter part of the eighteenth century. Lord Harwick studied in an attorney's office, and Lord Thurlow in a solicitor's. The ancient English bar, in this respect, resembled more closely the American than that of modern England.

Wigs, the distinctive adornment of both judges and bar of modern times, are but an innovation, and were imported from France at the restoration of Charles II.; and, though society in general afterwards dropped them, the profession, with its love for precedent, has retained this French fashon to the present day. Our green bags are a relic of ancient times. They are now never carried by English lawyers; but on the stage of the theatres, in the seventeenth century, they were always borne by them. In Wycherly's "Plain Dealer," Widow Blackacre upbraids the barrister, who declines to argue for her, with "Gadsbodkins! you puny upstart in the law, to use me so; you *green-bag carrier*, you murderer of unfortunate causes, the clerk's ink is scarce off your fingers." It appears too, that, in Queen Anne's time, these green bags were carried by attorneys and solicitors as well; for Ned Ward, in "The London Spy," observes of a dishonest attorney, that "his learning is commonly as little as his honesty, and his conscience much larger than his green bag." Whether, in any or all these innovations on the ancient practice, any improvement has been made, may be a matter of divided opinion; but, in respect to another change, there can be but one. "In the seventeenth century," says Mr. Jeaffreson, "an aged judge, worn out by toil and length of days, was deemed a notable instance of royal generosity if he obtained a small allowance on relinquishing his place in court." Now the English people pay liberal pensions to those faithful servants and who have served them long and well. We still retain the ungenerous fashion of the seventeenth century.

The great rewards given to successful members of the profession in England, renders the lives of their distinguished lawyers the history of the country. Mr. Jeaffreson says the life of a lawyer comprises three distinct periods; first, the useful but inglorious labors of an overworked barrister; second, a term in which the more lucrative achievements of a popular leader are diversified by the triumphs of parliamentary warfare; third, the honors and emoluments of the woolsack or the bench. Including those peerages which have been won by persons whose families were first made noteworthy by great lawyers, as well as those won by actual lawyers, there were in the English House of Lords, at the time of the elevation of Lord Campbell to the peerage, three dukedoms, seven marquisates, thirty-two earldoms, one viscounty, and thirty-five baronies, held by "peers who, or whose ancestors, have filled the judicial seat in England;" and the number is constantly increased by the ennoblement of successful men, the last of whom is Sir Hugh Cairns. In the reply of Lord Thurlow to the Duke of Grafton, already alluded to, he says, "The noble duke cannot look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this house to successful exertions in the profession to which I belong." It would be foreign to the purpose of this book about lawyers, to give any thing like a detailed history of these men; but a curious and entertaining story is told of the Great Seal of England, and the vicissitudes to which it has been subjected. The seals, of which one may see the counterparts in any book of ancient English customs, are certainly not flattering portraits. Edward the Confessor, who is supposed to have set the fashion, appears to have been taken seated on a low stool, so that his legs, for the length of which he was noted, have scarcely that grace which might be desirable; and his knees are brought in painful proximity to his chin, making him resemble a trussed fowl rather than the "Lord's anointed." The conservative spirit of later kings probably induced them to copy their predecessors down to the middle of the eighteenth century, with some few exceptions

—such as the Conqueror, who appears mounted; and Queen Bess, whose expanse of stiff petticoat modestly leaves the position of her knees to the imagination.

(To be continued.)

ONTARIO REPORTS.

PRACTICE COURT.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

Ross et al. v. Grange.

Practice Court—No jurisdiction to rescind Chamber order.

Held, 1. That a judge sitting in Practice Court has not power in this country to set aside an order made in Chambers; an appeal from such order lies only to the Court *in banc*.
2. That if there be any objection to the mode of compliance with an order, application should be made to the judge who made it (following *Rennie* v. *Beresford et al.*, 3 D. & L. 467.)

[Practice Court, M. T., 1867.]

The plaintiff obtained a rule *nisi* in this Court as follows:

"Upon reading the order made in this cause on the 5th day of October, A.D. 1866, by the Honourable Mr. Justice John Wilson (a copy of which order is filed on this application), setting aside the judgment on demurrer signed in this cause, and giving the defendant leave to plead a plea, it is ordered that the defendant do, upon notice to be given to him or his attorney of this rule, shew cause why the said order of October 5th, 1866, and all proceedings taken thereunder, should not be set aside or rescinded with costs, on the ground that a judge in Chambers had no power to set aside a judgment on demurrer regularly signed in pursuance of a rule of court in that behalf, and that there could be no amendment of a pleading, as ordered in said order, after rule of Court giving judgment on demurrer, and not reserving leave to amend; and why all the proceedings after such order should not be set aside, and why the amendment pleaded should not be set aside with costs, on the ground that no leave was given by the order to defendant to amend, and that his only power was to add a plea."

C. Robinson, Q. C. (*Palmer* with him) shewed cause and made the following preliminary objections:

1. That the rule does not refer to the affidavits as having been previously filed or used in Chambers.

2. That the only affidavits filed on application for the rule are those of the plaintiff, and not *all* the affidavits used in Chambers, and the practice requires that all the material used in Chambers should be produced on moving against the rule.—Citing Ch. Pr. 1580, 1610, 1611; *Small* v. *Eccles*, 1 U. C. L. J., N. S, 122; *Needham* v. *Bristow*, 1 Dowl. N. S. 700; *Bennett* v. *Benham*, 15 C. B. N. S. 616; *Dickey* v. *Mulholland*, 2 Prac. Rep. 69; *Mitchell* v. *Hardi g.* 5 L.T. N.S. 348; *Warman* v *Halahan*, 30 L. J. Q. B. 48; *Hall* v. *Featherstone*, 4 Jur. N. S 813

3 That a judge sitting in Practice Court has no power to set aside an order made by a judge in Chambers. There is no appeal from Chambers to Practice Court. The practice here is regulated by statute (Con. Stat. U. C. cap. 10, secs. 9, 10), and differs in that respect from the practice in England.

As to costs, see *Croft* v *Lumley*, 25 L. J. Q. B. 81; *Phillips* v. *Maston et al*, 9 U. C. Q. B. 28.

McMichael supported his rule, citing *King* v. *Meyers*, 5 Dowl. 686.

Morrison, J.—It was admitted at the bar that the objection here taken had been raised for the first time; that applications to rescind and reverse judges' orders had been frequently made in this Court without question, but as the want of jurisdiction is now urged it becomes necessary to see whether any authority is conferred upon the Practice Court to hear and determine an application of this nature.

The various writers of the books of practice say that the jurisdiction of a judge in Chambers is partly conferred by statute, and partly has grown up by immemorial usage, the origin being obscure. In England the statutes 11 Geo. IV. and 1 Wm. IV. cap. 70, and 1 & 2 Vic. cap. 45, give other judges of the respective courts there, when sitting in Chambers, a general and concurrent jurisdiction in the transaction of business, the same as if they were judges of the court in which the business or action is pending, the language used being similar and to the like effect as that used in the 10th section of our Con. Stat. U. C. cap. 10, with the exception that to the end of the 10th section of our Act, these words are added: "subject to the right of appeal to, and of revision by the full court in which the matter may be depending."

Previous to the establishment of the Bail Court in England under the 1 Wm. IV., already cited, (a court corresponding to our Practice Court) it is quite clear that if parties were dissatisfied with the order of a judge made in Chambers, they had to apply to the Court *in banc* either to rescind or review it; and since the 1 Wm. IV. it has been held in England that a single sitting in the Bail Court could reverse the decision of a judge in Chambers. I refer to the case of *King* v. *Meyers*, 5 Dowl. 686. It was there contended that it was not competent for a judge sitting in the Bail Court to reverse the decision of a judge at Chambers, when Coleridge, J., said "it was the continual practice of that Court to entertain such motions, and that the judges would be extremely sorry if anything which passed at Chambers could not be reversed in the Bail Court."

Upon the strength of that authority, I would have held that this court had authority to deal with this motion, were it not for the proviso already referred to, appended to sec. 10 of our act, providing that Chambers business transactions by a single judge out of Court are subject to the right of appeal to and of review by the *full* court in which the matter may be depending.

The Legislature by the previous section (sec. 9) established the Practice Court with very general powers, and I think we may presume that their attention was drawn to the point, and when enacting the provisions respecting the transacting of business in Chambers, they reserved the right of reviewing a judge's order to the full court, using the word "full" for the purpose of distinguishing the court, or the court *in banc*,

from the Practice Court, authorised by the previous section.

I am therefore of opinion that I must sustain the objection as to jurisdiction.

It was also contended by Mr. McMichael that if I had no authority to rescind the decision of my brother Wilson, that that part of his rule which asked to set aside the amendment pleaded under the judge's order should be made absolute, as the only power given by the order was to add a plea, and not to amend; but I think the proper course in such a case is that pointed out in *Rennie et al* v *Beresford et al.*, 3 D. & L. 467, where Alderson, Baron, said: "If there be any objection to the mode of compliance with the order I made at Chambers, that is a proper matter to go to Chambers again, for application should be made to the judge to enforce his own order. It is only proper to come to the Court when you deny the exercise of the judge's discretion at Chambers."

The rule will be discharged, and there can be no costs; and, as plaintiff desires it, all proceedings will be stayed until the first four days of next term.

Rule discharged without costs.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

McInnes v. Davidson.

Insolvent acts—Order by judge to produce books—Insufficient compliance—Contempt—Punishment, nature of.

An insolvent was ordered by a county judge to produce certain books and papers. These were at the time at Bruce Mines, and the insolvent did not feel called upon to go there for them, and an order was made *ex parte* for his committal for disobedience of the order. The insolvent had, however, in the meantime, taken the books to Montreal and given them to one H. to hand to the assignee. He was then arrested, and subsequently applied for his discharge, which was refused. The books were afterwards handed over to proper person, though in a mutilated condition, which the insolvent said must have been done at Montreal. He then again applied for his discharge on the ground that he had complied with the order, and that the imprisonment was for compulsory purposes only. The county judge, however, made an order refusing the application, and the insolvent then appealed from this last order to a Judge in Chambers in Toronto.

It was urged that the warrant of arrest was insufficient on its face; that no demand was made of the books, or refusal to give them shewn, and therefore no contempt; and that the power of imprisonment was only to enforce compliance with the order, and not *in perpetuum*.

Held, 1. That the judge at Toronto had no right to enquire into the legality or propriety of the warrant for arrest, or as to the nature or object of the imprisonment authorised by the statute, or whether the warrant was an order and so an appealable matter under the acts.

2. That the last order of the county judge was not improperly made, and the appeal was merely an appeal from that order.

The purposes for which imprisonment is imposed enumerated.

Quære, whether in this case the imprisonment was coercive or punitive.

[Chambers, November 15 1867.]

Notice of appeal, dated the 10th of October, 1867, was served by the defendant (an insolvent) that he would appeal to one of the judges of Common Law at Toronto against the order and decision of the judge of the County Court of the County of Wentworth made on the 16th of September last, refusing and discharging the petition of the insolvent, wherein he prayed to be discharged from further imprisonment under the warrant of the said judge of the County Court of the 17th August last; and, the appeal having been allowed, notice was further given that the insolvent would present a petition to the presiding judge in Chambers at Osgoode Hall, and that the insolvent would (amongst other things) insist on the following ground of appeal, namely, that he had complied with the order of the said judge of the County Court, on the 26th of June last, fully, or as fully as it was in his power to do, and therefore should have been discharged by the said judge—the power of imprisonment conferred on the said judge being intended for compulsory purposes only, and not for purposes of punishment.

The petition stated that the insolvent, who had been carrying on business as a country merchant at the Bruce Mines, assigned on the 16th of November, 1866, all his property and assets to John Whyte, an official assignee, then and now of Montreal, in trust for the payment of his debts, and his estate having been subsequently placed in compulsory liquidation, such proceedings were had that the appointment of John Whyte as such assignee was confirmed:

That on the 26th of June, 1867, the said judge of the County Court, acting in Insolvency, made an order requiring the insolvent to deliver to the said assignee, or such agent as he should name, all letters, books containing copies of letters in any way connected with his late business, and all letters, vouchers, notes, deeds and documents relating thereto, which order was served on the insolvent, in Hamilton, on the same day:

That at the time of serving the said order the insolvent had only some letter books, some registered deeds for lands, and a bundle of old letters, retired notes and accounts, or invoices of no use in ascertaining the state of his affairs, all of which at that time were at Bruce Mines, some hundreds of miles from Hamilton, and much further from Montreal, where the assignee lived:

That the insolvent was never after the service of the said order asked for the said books and documents by the assignee, or by any one professing to be authorized by him to receive them, but nevertheless, on the 17th of August, 1867, a warrant was issued by the said judge of the County Court, on the *ex parte* application of the plaintiff, ordering the insolvent to be committed to the common gaol of the county of Wentworth for six months, under which warrant he was arrested in Montreal, and conveyed thence to Hamilton, and lodged in the common gaol, where he is now incarcerated under the said warrant:

That on the 24th of August, 1867, the insolvent applied to the said judge of the County Court to be discharged from imprisonment under the said warrant, which application was refused by the judge:

That the insolvent did not understand that the order for the delivery of the books and documents imposed on him the obligation of going or sending to Bruce Mines for them, or of carrying or conveying them to the assignee at Montreal, as the insolvent was informed the said judge in effect held in refusing the application of the insolvent: and that if it did impose upon him

such an obligation, it was absolutely beyond his power to comply with it, having not a dollar of his own, nor any means of defraying the expenses thereof, the assignee having received all his property and assets; but having been gratuitously provided by some relatives with the means of going to Bruce Mines, no part of which was furnished either by his creditors or by the assignee, he conveyed the said books and papers to Montreal, and left them at the counting house of Messrs. Hingston, Telfer & Co. in Montreal, and the assignee received notice thereof, and the books and papers were shortly after, as the insolvent has been informed and believes, offered to the assignee by Mr. James Hingston, of the firm of Hingston, Telfer & Co., but he declined to receive them:

That after the refusal of the application of the insolvent to be discharged, he procured the said books and papers to be forwarded from Montreal and delivered to Miles O'Reilly, Esq., who, as the insolvent, was informed delivered them to Messrs. Burton & Bruce, the assignee having, as the insolvent was informed, authorized such delivery to them as a delivery to himself:

That on the 30th of August, 1867, the insolvent applied to the said judge to be discharged from further imprisonment, setting forth in his petition for that purpose the previous sentiments, which application was refused on the 16th of September last:

That the insolvent complied with the said order of the 26th of June last to the utmost of his power before making the last-mentioned application, and his further imprisonment can be of no use to any one, except thereby to coerce some of his friends or connections into assuming the payment of his debts, but, on receiving the said letter books from Montreal (which contained the insolvent's private as well as his business letters), he found that some leaves had been removed from the one of most recent date, and although he was unable to set forth what was contained on the said missing leaves, he is able to say, and does say, that they did not contain any matter of any use to the assignee or his creditors in ascertaining the state of his affairs or otherwise howsoever; and that he is unable to say how the missing leaves were removed, but they were removed without the insolvent's knowledge or consent, and against his will; and until he received the affidavit of James Hingston, of the 11th of September, and of Edward J. Lindsay, of the 10th of September, he was under the belief that they were removed while the said books were lying in the counting house of Hingston, Telfer & Co., in Montreal.

The insolvent, therefore, prayed that he might be allowed to appeal from the last-mentioned decision of the said judge, and that the said decision might be reversed, and he discharged from further imprisonment under the said warrant, being fully persuaded that he could not live the said six months if retained in his present place of confinement.

W. Sydney Smith shewed cause.

The warrant of imprisonment is not an order appealable by the statute, and the sentence of imprisonment when awarded cannot be remitted. *Ward* v. *Armstrong*, 4 U. C. Prac. Rep. 60; Insolvent Act of 1864, sec. 8, sub-sec. 7; Insolvent Act of 1865, sec. 29.

Jas. Patterson and *Curran* supported the petition.

The insolvent may proceed in case of a wrongful imprisonment either by way of appeal under the statute, or by *habeas corpus* at the common law; Deacon's Law of Bankruptcy, 727; *Ex parte Jones*, 1 Mont. D. & D. 145.

The warrant should have stated that the insolvent had the books and documents in his possession which he was committed for not delivering; *Crowley's case*, 2 Swan. 1.

No jurisdiction is shown on the face of the warrant.

No demand of books was ever made of the insolvent, nor was any refusal by him to deliver them shown. There was therefore no contempt. It is not mere disobedience that is punished—it is *wilful* disobedience, and none is shewn here; *Miller* v. *Knox*, 4 B. N. C. 574.

That the power of imprisonment is conferred only to enforce compliance with the orders of the Court, and when that has been secured the imprisonment should no longer be continued. It was not intended strictly to be a proceeding in *pœnam*: *Ex parte Oliver*, 1 Rose 407, 2 V. & B. 245; *Ex parte James*, 3 Jur. 538.

Adam Wilson, J.—The clause under which the original order of the 26th of June, 1867, for the delivery by the insolvent of his letter books to the assignee or to any agent he might name, is sec. 29 of the Act of 1865. But the judge must have possessed such power, independently of that clause, under sec. 3, sub-secs. 9, 11, 22, of the Act of 1864, although what his power of punishment would have been in the absence of the express provision contained in the act of 1865 is not quite certain.

No complaint has been made in this present appeal against the order of the 26th of June, for the delivery up of the letter books, nor has any complaint been made against the warrant of commitment dated the 17th of August last, imposing six months' imprisonment upon the insolvent, "or until this Court (the County Court judge) shall make order to the contrary." Nor is any complaint made that the petition of the insolvent to the judge of the County Court, dated the 22nd of August last, praying to be discharged from custody under the warrant of commitment was improperly disposed of, the judge having been of opinion "that the insolvent was disobeying the order of the 26th of June," and "refusing to rescind or set aside the order for commitment, or to make any order for discharge of the insolvent, unless he complied with the order requiring him to deliver up these books and papers."

The appeal is merely against the order of the Judge of the County Court of the 16th of September last, refusing to grant the application of the insolvent, of the 30th August, to be discharged from further imprisonment, because he had complied with the order for the delivery up of the letter books, &c., so far as it was in his power to do.

In disposing of that application, the learned judge said that he considered sec. 29 of the Act of 1865 both compulsory and punitive, because the time fixed by it was definite and not

"until further order:" that the term of imprisonment awarded under the Con. Stat. U. C. ch. 24, sec. 41, was of the same nature, and the punishment under it had been considered as final when it had been ordered: That he had before thought the insolvent had wilfully disobeyed the order of the 26th of June, and he was not satisfied the insolvent had done all in his power since to comply with it. "It was his duty to hand the books and letters to the assignee, but instead of doing so he hands them to the person whose claim upon the estate is, apparently with good reason, disputed by the assignee, and whose interest it was to destroy any letters tending to shew that his account is incorrect. Certain letters have been removed apparently by Mr. Hingston, for the insolvent swears that the letters were in the book when it was handed to him. He also says that the books and letters were handed to Mr. Hingston to be delivered to the assignee; he was therefore the agent of the insolvent for the purpose of delivery, and the insolvent is bound for his acts and omissions. For all that appears, these missing letters may still be in the hands of his agent, Mr. Hingston, and until the insolvent shews how these letters were abstracted and what has become of them, or produces them, he does not come into Court with clean hands to ask for his discharge. . . . I refuse to grant the prayer of the petition for the discharge of the insolvent." In pursuance of this, the order of the 16th of September now appealed from was drawn up.

As I have before stated, I do not consider I have to determine on the regularity, legality, or propriety of any of the proceedings prior to the application of the 30th August, and the order made thereon, unless so far as the grounds of appeal necessarily extend to them, and bring them within the operation of the appeal—and a ground of appeal, that the judge should have discharged the insolvent because the insolvent, as he maintained and now maintains, had complied with the order of June, so far as it was in his power to do so, will not, in my opinion, let in objections to the validity or invalidity of the warrant because it was *ex parte*, or because it does not set out a full enough cause for commitment, nor because the insolvent could not or should not have been required to go to the Bruce Mines without a tender of his expenses for the purpose of getting the books and taking them to the assignee. Nor have I to consider whether the warrant is an order, and so appealable or not, because the warrant has not been appealed from. Nor am I required to determine whether the 29th section of the Act of 1865 makes the imprisonment unconditional for the term awarded, or whether its purpose and object are not just as the warrant in this case is, in fact punishment in substance, but determinable on submission made—"six months imprisonment or until this court shall make order to the contrary."

Imprisonment is imposed for different purposes—for *prevention*, as by a constable to hinder a fray, or by any person to restrain a misdemeanor or prevent a felony: for *security*, as in cases for debt or other civil demand before judgment: or in criminal cases before investigation or trial, or until sureties for the peace are given, by way of satisfaction as upon a *capias ad satisfaciendum*: in *coercion*, to ensure the performance of some particular act, as in cases of actual contempt, until the contempt be purged; and in cases of supposed contempt, as for not making a return of legal process: or for not paying over monies raised by such process by officers of the court, until return or payment is made, and to enforce the payment of pecuniary fines: and *punitive*, as in criminal sentences.

In cases of contempt the warrant of commitment is properly expressed, that the party be kept until further order; *Green* v. *Elgie*, 5 Q B. 99.

Whether the imprisonment here is coercive or punitive it is not for me at present to express an opinion, nor is it for me to say which it is in cases arising under ch. 24, sec. 41, before referred to.

When a party is "recommitted to close custody for any period not exceeding twelve months and to be then discharged," under the Con Stat. U. C. ch. 26, sec. 11, because it appears to the court or judge that the debt was contracted by fraud, &c., is a case, I should think, of plain and direct punishment, nothing can be done or is to be done compensatory or in mitigation of it. Whether the same can be said where the principal purpose is to procure the delivery of books, or the giving of full information which may benefit the creditors, and when the refusal is sure to be persisted in if the imprisonment is to be maintained, is not very clear; that it may be till answer made or until further order is perhaps quite probable: *The King* v. *Jackson*, 1 Q. B. 653; *Groome* v. *Forrester*, 5 M. & R. 61.

The reason I am not called upon to consider what the nature of the imprisonment which has been awarded under the 29th section before mentioned is, that on the merits of the application, assuming the judge could review and alter his former decision, I think the learned judge was quite right in treating the delivery over of the books in a mutilated form, and which mutilation to some extent might not unfairly be attributed to the insolvent, and at any rate that it had not been satisfactorily accounted for or explained, or what had become of the missing leaves, was not conduct which amounted to a compliance by him of the order of the 26th of June, so far as it was in his power to comply with the same.

If I had been of opinion that the insolvent had truly complied with the order referred to, I should have been obliged to have considered whether it was or was not within the jurisdiction of the learned judge to have re opened the question and term of imprisonment.

Because I conceive the order of the learned judge of the 16th of September was not improperly made discharging the application of the insolvent of the 30th of August, I must dismiss the appeal with costs, to be paid by the appellant to the present plaintiff.

Appeal dismissed with costs.

CHANCERY CHAMBERS.

(*Reported by* Mr. CHARLES MOSS, *Student-at-Law*)

BENNETT v. SPRAGUE.

Next friend—Married woman—Stay of proceedings.

A defendant in a suit cannot act as the next friend of the plaintiff, a married woman. Proceedings were stayed until another next friend should be appointed.

[Chambers, 22nd March, 1867.]

The bill was filed by the plaintiff, a married woman, by J. W. M., her next friend, against several defendants, one of whom died intestate during the progress of the suit. J. W. M. obtained letters of administration to the deceased's estate, and was added as a party defendant to the suit, by order of revivor.

Another defendant thereupon moved for an order to stay all further proceedings in the cause until the plaintiff appointed another and proper next friend.

Moss, in support of the motion, cited *Payne* v. *Little*, 13 Beav. 114; *Anon.* 11 Jur. 258, and argued that the former case was exactly in point and must govern this.

Hodgins, for the plaintiff, relied upon the language of Lord Cranworth in *Elliot* v. *Ince*, 7 DeG. McN. & G. 475; 3 Jur. N. S. 597; and also cited Jarman's Pr. 20. He asked leave to sue in *forma pauperis*, if the present application should be granted.

THE JUDGES' SECRETARY.—I think I must follow *Payne* v. *Little*, and stay proceedings until the plaintiff appoints a new next friend. The application for leave to sue in *forma pauperis*, must be the subject of an independent motion.

ROGERS v. CROOKSHANK.

Affidavit on production—Insufficiency of.

[Chambers, Nov. 29, 1867.]

This was an application to take an affidavit on production off the files for insufficiency. The affidavit was a printed copy of the form in Schedule K. to the orders, and referred to documents in the various schedules annexed, but no documents were set out in the schedules.

THE JUDGES' SECRETARY.—I direct the affidavit to be taken off the files with costs. I cannot but disapprove of the want of care evinced in its preparation. No solicitor ought to have permitted his client to swear to it. The late V. C. Esten on several occasions expressed his strong disapprobation of the use of printed forms where the facts are not easily capable of being adapted to them.

SAME v. SAME.

Omission of addition or description of deponent in affidavit—Irregularity—Costs.

An affidavit should contain the description or addition of the deponent, or, if made by a plaintiff or defendant, should shew that he is such plaintiff or defendant.

An affidavit on production made by W. R., not stating any description or addition or otherwise shewing that he was a party to the suit, was ordered to be taken off the files, but as the omission was a mere slip, the order was made without costs, and leave was granted to re-file the affidavit.

[Chambers, Dec. 11, 1867.]

T. H. Spencer moved to take the affidavit of the plaintiff, William Rogers, on production of documents, off the files for irregularity, on the grounds:

1. That it did not appear that defendant was the plaintiff

2. That there was no addition or description to deponent's name.

He referred to 1 Dan'ls Prac. p 827; Taylors Orders, p. 132; and *Crockett* v. *Bishton*, 2 Mad. 446.

Bain, contra, contended that the affidavit having been made and filed in obedience to the order to produce served by defendant, must be presumed to have been made by plaintiff. The third paragraph of the affidavit shewed that it must have been made by a party. There was only one William Rogers a party to the suit, and the bill shews his residence and description. There was no case in point cited in support of the application, and in the case of *Sprague* v. *Henderson* (unreported upon this point) V. C. Esten overruled a similar objection. He cited *Fisher* v. *Coffey*, 1 Jur. N. S. 956, and asked leave in case the affidavit was held bad to re-file it.

THE JUDGES' SECRETARY.—The affidavit must be taken off the files, but the omission being a mere slip, the order is without costs. I grant leave to re-file the affidavit.

BOLSTER v. COCHRANE.

Motion by plaintiff to reinstate bill—Plaintiff residing out of jurisdiction—Security for costs of motion.

[Chambers, Dec. 9, 1867.]

This was a motion by the plaintiff to set aside a consent to the dismissal of the bill, and the order of dismissal made thereon, on the ground that the consent was obtained by fraud. The plaintiff resided out of the jurisdiction of the court.

S. H. Blake for the defendant, asked that the plaintiff might be ordered to give security for the costs of the motion before it was entertained by the court.

THE JUDGES' SECRETARY ordered that security to the amount of $100 should be given before the plaintiff could be allowed to proceed with his motion.

DENISON v. DENISON.

Entitling papers on motion to set aside bond for security for costs of appeal—Prior irregularity by party objecting to irregularity—Estoppel.

The papers and affidavits used on a motion to set aside a bond for security for costs of appeal from the Court of Chancery, should be entitled in that court.

The fact that a party objecting to an irregularity has himself committed a similar irregularity, which in a measure led to that objected to, does not estop him from taking the objection.

[Chambers, January 7, 1868.]

F. Holmested moved the disallowance of the bond for security for costs of appeal filed by the plaintiff.

R. Sullivan, contra, objected that the notice of motion and the affidavits proposed to be read on the motion were entitled in the Court of Error and Appeal, whereas they ought to have been entitled in the Court of Chancery. Until the

petition in appeal was filed there was no cause in the Court of Error and Appeal. He cited *Weir* v. *Matheson*, 1 Cooper's Chan. Cham. R. p. 81, and *Harvey* v. *Smith*, 2 E. & A. Reports.

Holmested in reply stated that the notice of filing the bond was entitled in the same way, and the style of cause had been copied from it, and therefore, he contended, the plaintiff was estopped from raising the objection.

The Judges' Secretary.—I think the objection to the entitling of the affidavits and notice of motion is fatal. The fact that the notice of filing the bond is styled in the Court of Error and Appeal, is no answer. The motion must be refused with costs.

INSOLVENCY CASE.

(Before His Honor Alexander Macdonald, Esq., Judge of the County of Wellington.)

Simpson v. Newton.

Insolvent Act 1864, *sec.* 5, *sub-sec.* 10—*Action against assignee for dividend.*

Held, that an action may be brought against an assignee in insolvency for a dividend on a duly collocated and advertised claim which has not been objected to.

[Guelph, January, 1868.]

This was an action brought in the Division Court at Guelph, against the defendant as official assignee of the estate of Hockin & Hockin.

The particulars of the plaintiff's claim were for $100 (abandoning the excess of $117.50 over the sum of $100) proved before the assignee in due form of law, for three months arrears of wages due from the insolvents to him, for money payable by the defendant, as such assignee, to the plaintiff, for money received by the defendant as assignee for the use of the plaintiff, &c.

From the evidence it appeared that the plaintiff had made and filed an affidavit on the 2nd of March, 1867, with the defendant, official assignee of Hockin & Hockin, in which he stated that the insolvents were indebted to him in the sum of $117.50, for work done by him as their hired servant.

The plaintiff's claim was collocated in the dividend sheet as a privileged claim for $117.50 for wages under the 10th sub-section of section 5 of the Insolvent Act, 1864. This dividend sheet was duly advertised. No objection was made by any creditor under the Insolvent Act.

The assignee objected to the claim, but he did nothing further than to inform the plaintiffs that it was objected to, until the plaintiffs applied for the amount of his claim, which was after the expiration of six days from the last publication of the advertisement, when the assignee required further particulars respecting the claim. A second affidavit was then furnished by the plaintiff, sworn on the 3rd of October. The assignee made an appointment in writing dated the 19th October, for the 21st October, to hear and examine the parties, and hear evidence as to the claim of the plaintiff. The plaintiff's solicitor, upon whom the appointment was served, attended and acted for him; but without further notice to the assignee this action was commenced.

It was objected for the defendant at the trial, that the defendant, as assignee, could not be sued for a dividend.

But it was held by the learned judge that such an action could be maintained, as the plaintiff had complied with the Act in proving his claim before the assignee, who collocated it on the dividend sheet as a privileged claim, and it having been duly advertised, and unobjected to by any creditor.

Evidence was taken to shew that the plaintiff was not entitled to hold his claim, subject to the plaintiff's objection that the assignee could not dispute it under the circumstances.

Macdonald, Co. J., having taken time to consider, delivered the following judgment:—

Sub-section 10 of section 5 of the Insolvent Act provides "that clerks and other persons in the employ of the insolvent, in and about his business or trade, shall be collocated in the dividend sheet by special privilege for any arrears of salary or wages due and unpaid to them at the time of the execution of the deeds of assignment, &c., not exceeding three months of such arrears."

Sub-section 11 provides that "as soon as a dividend sheet has been prepared, notice thereof shall be given by advertisement, and after the expiry of six judicial days from the day of the last publication of such advertisement, *all dividends* which have not been objected to within that period *shall be paid.*"

By the 16th sub-section of section 4, assignees are made subject to the summary jurisdiction of the court or judge in the same manner as other officers of the court are made subject to its jurisdiction, but a creditor's remedy by action is not taken away, as under the Bankruptcy Acts in England, wherein the remedy by petition for redress against an assignee who refuses to pay a dividend is substituted for the former remedy by action. It is there expressly provided that no action for any dividend shall be brought against assignees by a creditor who has proved under a commission.

By the interpretation clause the word "collocated" means ranked or placed in the dividend sheet for some dividend or sum of money, so that the amount for which the plaintiff was collocated for wages is included in the term dividend, and is subject to objection like any other dividend, and if not objected to by a creditor in the words of the Act, "must be paid."

As there is nothing in our Insolvent Act to deprive a creditor of his action of debt for a dividend, in the face of the positive enactment that all dividends not objected to shall be paid, my opinion is that an assignee cannot resist the payment of a dividend on the ground that the debt was not due or entitled to rank as collocated on the dividend sheet.

In *Ex p. Hodges*, Buck. 524, it was held that an application by petition against an assignee could only be resisted by the assignee, on the same grounds that he might have availed himself of, as a defence to an action before the remedy by petition was instituted for the former remedy by action. On such a petition the assignee cannot dispute the debt, but he might under the Bankruptcy Acts make it the subject

matter of a distinct petition to impeach the creditor's proof and debt. See *Ex p. Lorly*, Buck. 456, and *Ex. p Whitside*, 1 Rose, 319.

In *Ex p. Alexander*, 1 Deacon & Chitty, 514, in which the creditor petitioned the Court to compel the official assignee to pay his dividend, which the assignee disputed on the ground that the creditor had funds of the estate, Sir G. Rose said: "It appears impossible to contend that an official assignee can remit an *order* for the payment of a dividend. It is unquestionable that before the 39 Geo. III. c. 121 (the first statute which took away the right of action from a debtor against assignees for the recovery of his dividends), a creditor at his own option might bring an action for the recovery of a dividend, or present a petition to the Lord Chancellor, and that it was enough for him to shew the order of the commissioners for the payment of the dividend, the amount of which was considered as so much money had and received to the creditor's use. In an action of assumpsit brought against the assignee it was not competent to him to shew that the debt ought to be expunged. An improvement was made in this branch of the bankrupt law, and now no action will lie against an assignee for a dividend, but all claims of this description were transferred to the jurisdiction of the Lord Chancellor. "The difficulty we have to contend with is, that the resistance is made to the payment by a party who has no right to come into Court to litigate that question. An official assignee is an officer purely ministerial, and the Act of Parliament holds out no pretence for his coming into Court to dispute the payment of a dividend."

The majority of the Court agreed with that view of the case.

It appears to me that the positive enactment that the dividends not objected to "shall be paid," is quite as forceable and binding as a commissioner's order under the Bankruptcy Act in England, and that an assignee having collocated a claim on the dividend sheet duly advertised, his duty is fulfilled, unless the claim is disputed by a creditor when he becomes the arbitrator between the parties; but if the dividend is not objected to, it must be paid.

There was no objection upon which the assignees appointment of the 19th of October to hear the parties could be founded, the claim not having been objected to by a creditor. The plaintiff was not therefore bound to attend upon that appointment. No doubt the $117.50 was due to the plaintiff. It is not necessary to determine now how much should have been ranked as a privileged claim, having determined that the defendant, as assignee, cannot dispute a claim or dividend collocated by himself in a dividend sheet advertized and unobjected to by a creditor.

Judgment for the plaintiff $100 and costs, to be paid in ten days.

Judgment for plaintiff.

ENGLISH REPORTS.

QUEEN'S BENCH.

PLAYFORD v. THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY.

Contract — Privity — Negligence — Breach of duty, causing damage—Public duty—Private duty.

The receiver of a telegram cannot maintain an action for a mistake which has caused him damage. The person who pays for the transmission of a message is the only one who has a right of action in case he is damnified by the negligence of the company or its servants.

Semble, that where a telegraph company is required by Statute to send messages, and empowered to make a maximum charge, the company imposing such maximum charge is bound to use reasonable care in the transmission of messages, and cannot, by imposing any condition on the sender of a telegram, escape the obligation to use reasonable care, as such a condition would be inconsistent with their statutable duty, and would be also unreasonable.

[Q. B. Nov. 19, 1867.—16 W. R. 219.]

This was an action brought by a person to whom a telegram had been sent from one of the stations of the United Kingdom Electric Telegraph Company, and who, in consequence of a mistake in the transmission of it, was so misled that he was damnified.

The 1st count of the declaration stated, that before and at the time of the grievance hereinafter mentioned, the defendants carried on the business, amongst other things, of transmitting and giving effect, by means of the telegraph and apparatus of the defendants and otherwise, to intelligence and messages, for certain hire and reward in that behalf; and the plaintiff, being the owner of a cargo of ice on board a ship lying off Grimsby, Messrs. Rice & Holbyer, of Hull, instructed the defendants, at their office in Hull, to transmit to the plaintiff, to wit, under the name or style of J. Northcote, at his office in London, a telegraphic message, to the purpose and effect that the said Messrs. Rice & Holbyer could give the plaintiff under the said name 23s. per ton for the said cargo then at Grimsby, and, although the defendants, for certain hire and reward paid to them in that behalf, undertook to transmit the said message to the plaintiff, yet the defendants wholly neglected to, and did not transmit the said message, but they transmitted to the plaintiff a message to the effect that the said Messrs. Rice & Holbyer would give the plaintiff 27s. per ton for the said cargo, and the plaintiff thereupon accepted the said supposed offer of 27s. per ton, which was then the market value thereof, and directed the captain of the said ship containing the said cargo to proceed to Hull to be unloaded by the said Messrs. Rice & Holbyer; and, although the said Messrs. Rice & Holbyer refused to pay more than the price they had offered of 23s. per ton, the cargo being of a perishable quality, the plaintiff was compelled to sell the said cargo at Hull aforesaid at the said price of 23s. per ton, which was below the market value thereof, and the plaintiff lost and was deprived of the difference between the market value of the said ice and the price which the said cargo realised, and was put to further losses and expenses, to wit, £— &c., for demurrage and melting of cargo, by reason of the misfeasance of the defendants aforesaid.

The 2nd count charged that, by the negligence of the defendants in working the telegraph, an untrue message was sent, causing the damage specified in the 1st count.

The 3rd count alleged a contract on the part of the defendants, and its breach, causing the damages alleged in the 1st count.

The 4th count alleged a retainer of the defendants by the plaintiff, creating a duty on their part, and its breach causing the damages alleged.

The defendants pleaded—

1st. That they did not undertake to transmit the said message to the plaintiff, as alleged.

2nd. As to the 1st count, that they undertook to transmit the said message upon and subject to a certain condition, and not otherwise, that is to say, "In order to provide against mistakes, and more effectually to insure delivery, every message of consequence ought to be repeated, by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged in addition for repeating the message. The company will not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of unrepeated messages, from whatever cause arising, either upon its own lines or those of any other company or government which may be employed to forward the message to its destination. Nor will the company be responsible for mistakes or delays in the transmission of, nor for the non-delivery of a repeated message to any extent above £5, unless it be insured at the rate of £1 per cent."

Averments:—That the said message was not repeated, and that the alleged grievance was a mistake in the transmission of an unrepeated message.

3. That they were not employed to send and transmit the said message to the plaintiff by the plaintiff.

4. As to the 2nd count, that they undertook to send and transmit the said message to the plaintiff, subject to the condition mentioned in the 2nd plea, and not otherwise (averments as in 2nd plea).

5. As to the 3rd count, that the plaintiff did not become, nor was he a sender of messages, as alleged.

6. As to the same count, that the said message was sent by the plaintiff, and received and transmitted by the defendants subject to the condition in the 2nd plea mentioned, and not otherwise (averments as in the 2nd plea).

7. That they were not retained or employed as alleged.

8. That they were retained and employed subject to the condition in 2nd plea mentioned, and not otherwise (averments as in 2nd plea.)

There was also a demurrer to 1st, 2nd, and 4th counts.

1. Issue taken on the defendants' pleas.

2. Replication as to 2nd and 4th pleas that plaintiff was not privy to the alleged condition, nor did he assent thereto, and as to 2nd, 4th, 6th and 8th pleas that the negligence complained of was gross negligence, and was such that the condition in these pleas set forth did not exonerate nor in any wise protect the defendants from liability in respect thereof.

3. Demurrer to 2nd and 4th pleas as not shewing that the agreement and condition was with the plaintiff.

The defendants demurred to the replications to 2nd and 4th pleas on the ground that it was immaterial whether the plaintiff was privy or assented to the condition; and to the replication to the 2nd, 4th, 6th and 8th pleas, on the ground that the conditions set forth in these pleas exonerated and protected the defendants from liability in respect of gross negligence.

Littler, for the plaintiff.—Though there may be no contract with the plaintiff, yet he has an action for the damage done to him in consequence of the defendants' negligence. There is a public duty cast on the defendants, by the Act of Parliament by which they are incorporated, to convey messages, and a person injured by a breach of that duty sustains both a *damnum* and *injuria*. One section of the Act provides that any telegraphic apparatus erected under its provisions for receiving or sending messages shall be open for the sending and receiving of messages by all persons alike, without favour or preference. This imposes the statutable duty of sending messages with reasonable care, and a person who suffers by a breach of that duty may maintain an action. I contend that, under this Act, the duties of a telegraph company are very like the duties of a railway company. [Cockburn, C. J.—Any one paying the company a reasonable price for sending a telegram can maintain an action in case of mistake; but the duty is only owing to the sender, not to the person to whom it is sent. Suppose a person takes a document to be copied by a stationer, who makes a mistake in copying it, could any one else except the person who engages the stationer maintain an action in case his mistake caused him some damage?] There are many cases where the party injured can maintain an action even in a case arising out of contract, though the contract is not with him, as in the case of a surgical operation. [Lush, J.—In that case there is a consideration on the part of the patient (independently of any consideration moving from some one else) binding the surgeon to show reasonable care and skill. That consideration is the patient's consenting to allow the surgeon to operate on him.] But here there is a duty created by statute to send messages with reasonable care. [Cockburn, C. J.—A duty towards the sender only.] [Mellor, J.—Suppose you send a letter by the mail-train, and it misses its destination, can the person to whom it is sent maintain an action against the railway company?] There a public department intervenes, which complicates the case. As to the condition, it is inconsistent with the statutable obligation and the duty arising out of it. It is, moreover, unreasonable. He cited the following cases:—*Peak*, v. *The North Staffordshire Railway Company*, 10 H of L. cas. 473; 11 W. R. 1023, 32 L J. Q B. 24: *Williams* v. *The Lancashire and Yorkshire Railway Company*, 28 L. J., Ex. 353; *MacAndrew* v. *The Electric Telegraph Company*, 17 C. B 93; *Butt* v. *The Great Western Railway Company*, 1 C. B. 132; *Alton* v. *The Midland Railway Company*, 13 W. R 918, 34 L. J C P. 299; *Allday* v. *The Great Western Railway Company*, 5 B. & S.; *Godwell* v. *Steggall*, 5 B N. C.

735; *Langridge* v. *Levy*, 2 M. & W. 519; *Longmeid* v. *Holliday*, 6 Ex. 761.

C. Pollock, Q C. (*Hannen* with him), was told that he need only address himself to the second point, viz., the reasonableness of the condition. He contended that it was not unreasonable.

Cur. adv. vult.

NOV. 19. COCKBURN, C. J.—We think that we have not the facts of the case sufficiently before us to enable us to give judgment on it, and that it had better be stated in the shape of a special case. At present, we are with the defendants on the first point, and think that the demurrer to those pleas which state the message to have been sent by third parties is supported, because there is no privity of contract between the plaintiff and the company. It was said that, as the Act imposed the duty of sending messages for all persons, subject to certain conditions, any one injured by a breach of this duty sustains an actionable injury. But, though it is true that this duty is imposed by the Act, yet that is only towards those entitled to have messages sent, and does not create any obligation towards a person who is not entitled to have a message sent. Therefore, on these counts, the defendants are entitled to our judgment. But, with regard to the pleas which set up the condition as an answer to the action, a twofold question arises:—1st, whether the condition does not cover gross negligence, and is not, therefore, unreasonable; 2nd, whether, apart from the question of its covering gross negligence, it is unreasonable? As to this it occurs to us that the company is not in the position of companies which exercise powers arising out of ordinary rights of property. They exercise powers granted by statute. The defendants are empowered to erect structures *in solo alieno* without the consent of the owners; and then, apparently in consideration of this, the statute obliges them to keep their stations open for all persons desirous of sending messages, for certain charges, and subject to reasonable regulations. The statute having imposed this duty, which seems to involve that of using reasonable care, and having, in consideration thereof, empowered them to make a maximum charge, they annex a condition, to the effect that they shall not be answerable for negligence; in other words, that they will not observe due care in the performance of a statutable duty. Is that consistent with the statute, as being a reasonable regulation? If there was nothing more than an ordinary contract for the transmission of messages, there would be the ordinary obligation of using reasonable diligence. The statute says they shall transmit messages, and it surely must be understood that the obligation thus imposed carries with it also that of using reasonable care. The defendants say they will transmit messages for the maximum charge, but they will not use reasonable care. I am of opinion that, if the plaintiff were otherwise entitled to maintain this action, this condition would be no impediment to him. But we should prefer to have the facts stated fully, for then we should be better able to determine whether, on these facts, the plaintiff is entitled to recover, having reference chiefly to the condition; and also whether, supposing the company make the maximum charge, the obligation of reasonable care does not necessarily attach to them, so that it cannot be evaded by the imposition of any condition? The facts had better be stated in the form of a special case, in order to enable us to decide these questions.

CHANCERY.

BIRCH v. SHERRATT.

Will—Construction—Annuity—Payment out of capital.

A testator gave the moneys arising from the sale of his real and personal estate to trustees, upon trust to invest, and to stand possessed of the trust moneys and securities upon trust "out of the interest dividends and annual proceeds of the said trust-moneys, stocks, funds, mortgages, and securities," to "levy and raise the annual sum of £100," and pay the same to S. for her life. And "from and after the payment of the said annual sum of £100, and subject thereto," the testator declared that the trustees should "stand possessed of the said trust-moneys, stocks, funds, mortgages, and securities," upon the trusts thereinafter-mentioned. The income of the testator's estate proved insufficient to pay the £100 annuity.

Held (reversing Stuart, V. C.), that the annuitant was entitled to have the annuity made good out of the capital.

[L. J. July 25, 1867.—16 W. R. 30.]

This was an appeal from Vice-Chancellor Stuart.

John Simpson Sherratt by his will, dated the 13th May, 1847, gave devised and bequeathed all his real and personal estate to trustees upon trust to sell the real estate, and to stand possessed of the moneys arising from such sale, and of the testator's personal estate, upon trust to invest in manner therein mentioned, and "as to all such trust moneys, stocks, funds, mortgages, and securities as shall arise and be produced as aforesaid, and also such as shall form any part of my said personal estate at my decease, upon trust that" the trustees "do and shall with and out of the interest, dividends and annual proceeds of the said trust moneys, stocks, funds, mortgages, and securities, levy and raise the annual sum of £100, and pay the same by four equal quarterly instalments to my dear mother or her assigns during her natural life, and from and after the payment of the said annual sum of £100, and subject thereto, I do hereby declare that my said trustees shall stand possessed of the said trust moneys, stocks, funds, mortgages and securities, upon the trusts, intents and purposes hereinafter mentioned, expressed and declared of and concerning the same." Those trusts were as to one third part of the trust fund, upon trust for the testator's brother William Sherratt for life, with remainder to his wife for life, with remainder to his children in equal shares, with remainder over in default of children; as to another third part of the trust funds upon similar trusts in favour of the testator's brother Thomas Henry Sherratt and his wife and children; and as to the remaining third part of the trust funds upon trust for the testator's sister Eliza Sherratt and her children.

The testator died in the month of June, 1847, leaving his mother, his brothers, and his sister, him surviving. In June, 1859, this suit was instituted for the administration of the testator's estate. By the certificate of the Chief Clerk, made in February, 1861, it appeared that no payment in respect of the annuity of £100 a year had been made, but that it was due from the 5th June, 1847. It appeared that the whole clear residue of the testator's estate was insuffi-

cient to pay the arrears of the annuity. Under these circumstances the annuitant contended that the annuity was charged on the *corpus* of the estate and that she was entitled to the whole of the residue. The Vice-Chancellor held that the annuity was only payable out of income, and from this decision the annuitant appealed.

Kay, Q. C., and *Rigby*, for the appellant.

Cole, Q. C., *Cotton*, *Q.C.*, *Lindley*, *Cracknall*, and *Procter*, for the different persons entitled in remainder.

Faber, for the trustees.

The following cases were cited:—*Playfair* v. *Cooper*, 1 W. R. 216, 376, 17 Bea. 187; *Foster* v. *Smith*, 1 Ph. 629; *Baker* v. *Baker*, 6 H. L C. 618, 6 W. R. 410; *Phillips* v. *Gutteridge*, 11 W. R. 12; *Boyd* v. *Buckle*, 10 Sim 595; *Wroughton* v. *Colquhoun*, 1 DeG. & S. 36; *Picard* v. *Mitchell*, 14 Beav. 103; *Croly* v. *Weld*. 3 DeG M & G. 993; *Forbes* v. *Richardson*, 1 W R 320, 11 Ha. 354; *Torre* v. *Browne*, 5 H L C. 577; *Stellfox* v. *Sugden*, Joh. 234; *Perkins* v. *Cooke*. 2 Joh. & H. 393; *Clifford* v. *Arundel*. 1 DeG. F. & J. 307; *Sheppard* v. *Sheppard*, 32 Beav. 194; *Earle* v. *Bellingham*, 24 Beav. 445; *Miller* v. *Huddlestone*, 3 Mac. & G. 513.

July 25.—Lord Cairns, L J.—As this case has been argued so fully before us, and we have had an opportunity of considering it since yesterday, we need not trouble you, Mr. Kay, in reply.

There is no doubt that the will like every other will, must be judged of by the proper construction of the language the testator has used. The cases which have been cited are of little value except so far as they show that some definite construction has been put upon any word or set of words which may be found in this will as they have been found in other wills before.

Now I quite agree with what has been said, that the first and principal object very probably in the testaior's mind was to deal with his income, and having directed the conversion of his estate, and the investment of it, he declared that out of the income £100 a year should be paid to his mother for her life, and it is very possible that the testator may have been perfectly satisged in his own mind that the income would be sufficient, and continue to be sufficient, to pay that sum. And it is also possible, if it had been pointed out to the testator that the income might become deficient, that he might have made arrangements of a different kind from those which he has made in his will. We cannot speculate on any of those matters, but we must take the words he has used. The first words that occur are, "Upon trust that they the trustees do and shall, with and out of the interest dividends and annual proceeds of the said trust moneys, stocks, funds, mortgages, and securities, levy and raise the annual sum of £100 of lawful money of Great Britain and Ireland, and pay the same by four equal quarterly instalments to my dear mother or her assigns during her natural life." Those first words, if the will had stopped there, would not as at present advised appear to me sufficient to constitute a continuing charge upon the income or a charge upon the *corpus* for the payment of this £100 a year. I do not mean to say that there may not be cases in which a direction to pay out of a recurring income or out of rents may not indicate an intention to create a perpetual charge; but taking these words I have read, and judging of them alone, I think if they had stood alone there would have been nothing more than the direction to pay this annuity while the annuity lasted, namely, during the life of the mother, and out of the income, if the income was sufficient. But then come the very important words of the gift over. "From and after the payment of the said annual sum of £100, and subject thereto, I do hereby declare that my trustees for the time being shall stand possessed of the said trust moneys, stocks, funds, mortgages and securities upon trust for the ends, intents, and purposes hereinafter-mentioned. There is, therefore, from and after a certain event, or certain purpose, which I will consider presently, as it were a revesting of the trustees with whatever may be capital or *corpus* of the trust-moneys, stocks, funds, mortgages, and securities for certain further purposes, which were for division among the members of the testator's family as tenants for life and tenants in remainder. Now the view the Vice-Chancellor has taken of those words "from and after the payment of the said annual sum of £100, and subject thereto," is that they are merely referential words, and that they do not in any way go beyond what would be the proper construction of the preceding words, if the preceding words stood alone, and the construction that his Honour has adopted is first, to construe the preceding words and to hold that they indicate payment out of income merely, if the income should be sufficient, and then to construe the words I have referred to "from and after, &c.," as referential words, intended to express by way of reference the same idea and no greater idea than the preceding words express. If I were able to satisfy mpself that those were referential words merely, I should be satisfied with the construction his Honour has put upon the will, but I cannot satisfy myself that they are referential words. I think we have no right to curtail the natural meaning of the words, or to read, "from and after the payment of the annual sum," as if it were "from and after the *chance* of payment of the annual sum," or the words "subject thereto," that is to say, "subject to the payment of the annual sum of £100," as if they meant subject to the possibility of the payment of £100 if the income were sufficient I think the natural meaning of the words "from and after the payment of the annual sum," is "from and after full and complete payment of the annual sum of £100," and the natural meaning of the words "subject thereto," is "subject to the payment of the annual sum." That is to say "subject to the full and complete payment of the annual sum." Then, if that is so, this is a fresh trust created in favour of the beneficiaries, to take effect as a trust which does not commence until, and is only created subject to, the payment of the preceding gift of the annual sum of £100, which as I said before, must mean the full payment of the annual sum of £100. I, therefore, with great respect to the Vice-Chancellor, cannot arrive at the construction he has done, with every desire to do that which one is in a little danger of leaning too much to, a desire of giving provision to every one beneficially entitled under the

will. No doubt that was the desire which would have been effectuated by the construction which he gave to the will. I should be glad if I could arrive at that conclusion, but I am unable to do so. I think therefore that the annuitant is entitled to an order confirming her right to be paid the annuity of £100 and the arrears, and to have the payment made not merely by the continuing receipt of the income of the money, but by payment out of the *corpus*. I think we are not at all here in the difficulty, which sometimes arises with regard to the rents of real estate, as to whether the sale of the real estate was authorized. I think the tendency of the Court has always been stronger in modern times to say—where it found the purpose to be answered was that which would continue to exhaust the income of the trust fund—that the Court has ample power to apply the *corpus* or trust fund, and I think that is clear here from the words "subject thereto," that is, the *corpus* afterwards given over is subject to the payment of the annuitant.

Rolt, L J.—Having also had the opportunity (of which I have availed myself) of considering the argument which the counsel for the appellant addressed to us yesterday, and the argument of the leading counsel for the respondent, who also argued yesterday, and having examined all the cases which have been cited, except the cases of *Perkins* v. *Cooke*, *Earle* v. *Bellingham*, and *Miller* v. *Huddlestone*, which were cited this morning, and having had an opportunity of considering the argument raised this morning, I think also that the case may now be disposed of.

If the annuity is given out of rents and profits, or dividends and interest, and if the capital or *corpus* is given intact from and after the annuitants death to another, it is, in the event of the deficiency of the income to pay the annuitant, the case, or the equivalent of the case, of a life interest with remainder over. But if the capital is given over not in terms, "from and after the annuitant's death" but "from and after satisfaction of the annuity, and subject to the annuity," I think then it is the case, or the equivalent of the case, of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate or the trust fund. This view of the principle of construction, appears to me, not to be inconsistent with any one of the cases which have been cited.

Now in the present case the capital is in terms given "from and after the payment of the said annual sum of £100," and it is given "subject thereto." But it is said (and the argument is entitled to great weight, it is the whole of the argument on the other side, and it is the judgment of the Vice-Chancellor) that the words "subject thereto" mean subject to the payment of the annuity out of the income. It is, therefore, said that the annual sum is to come out of interest and dividends, that it is only "subject to the payment thereof" out of the interest and dividends. and that the whole capital fund spoken of as "the said trust moneys" is in this case given over. Even if that be the construction of the gift of the annuity, I doubt whether the conclusion drawn from it is well founded. If an annuity for life be given out of the interest of trust funds only, and then the trust funds are given after and subject to the satisfaction of the annuity, I should prefer the construction which gives the annuitant the benefit of the full payment, if necessary, out of the capital. But is it accurate in this case to say that the annuity is only given out of dividends and interest? I think that is very doubtful. What are the trustees to do with the rents and profits of the trust fund? To levy and raise the annual sum of £100, and then the annual sum thus levied and raised is directed to be paid to the annuitant for life. This admits, without any violence to the words, of a construction which makes the annuity a charge on the *corpus* or capital. It is not a mere gift out of the income. It is a direction to levy and raise out of income, the sum of £100, and that sum of £100 is to be paid to the annuitant. I am aware that the direction to levy and raise an annuity out of the rents and profits is to be found in some of the cases which have held the annuity only charged on the income, but the language of the direction in these cases will be found, in comparison with the words here, not to be nearly so strong in favour of a charge on the *corpus*, or capital, as the language before us. On the whole therefore I think that the annuitant is entitled to the capital of the fund, and that the order must be varied in that respect

Costs of all parties out of the estate.

PROBATE.

Smith and others v. Tebbitt and others.

Will—Testamentary capacity—Insanity, its tests—Religious enthusiasm—Its limits.

[August, 1867.—16 W. R. 18.]

The following is, in effect, the judgment of—

The Judge Ordinary.—The law of England permits a larger exercise of volition in the disposal of property after death than any other country, but coupled with this condition, that this volition should be that of a mind of natural capacity not unduly impaired by old age, enfeebled by illness, or tainted by morbid influence. Such a mind as the law calls a "sound and disposing mind."

A person who is the subject of monomania, though apparently sensible on all subjects and occasions other than those which are the special subject of his apparent infirmity is not in law capable of making a will.

Decided cases have established this propositon, that if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only on a certain subject, or that on all other subjects the action of the mind is apparently sound and the conduct even prudent, the testator must be pronounced incapable, even though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the Court.

The test of this disease is the existence of mental delusions. A mental delusion has been defined "to be the pertinacious adherence to some delusive in opposition to plain evidence of its falsity."

and such an appeal should, on motion, be dismissed with costs.—*Beaulieu, appellant* v. *Charlton, respondent*, 11 L. C. Jurist, 297.

4. A voluntary assignment must be made to an official assignee resident in the District in which the insolvent resides and carries on his business; and the amending Act, 1865, makes no change in this respect.—*Douglas* v. *Wright*, 11 L. C. Jurist, 310.

Negligence.

Held, that a party is responsible for the negligence of his contractor, where he himself retains control over the contractor and over the mode of work. The relationship between them is then similar to that of master and servant.—*Harold* v. *The Corporation of Montreal*, 3 L. C. L. J. 88.

See Carriers—Railway Company—Surgeon.

Nuisance.

A tomb erected upon one's own land, is not necessarily a nuisance to his neighbor; but it may become such from locality and other extraneous facts.

Plaintiff proved that defendant's tomb, erected within forty-four feet of the former's dwelling-house, contained, in 1856, nine dead bodies, from which was emitted such an effluvium as to render his house unwholesome; that, after an examination by physicians, the bodies were removed; that the tomb remained unoccupied thereafterwards, until 1865, when another body was therein interred; that the plaintiff's life was made uncomfortable while occupying his dwelling-house, by the apprehension of danger arising from the use of said tomb; and, that the erection and occupation of said tomb had materially lessened the market value of his premises. In an action for damages on the foregoing facts: *Held*, a nonsuit was improperly ordered.—*Barnes* v. *Hathorn*, (S. C., Maine) 7 Am. Law Reg. 81.

Promissory Note.

Where the principals and three sureties signed a promissory note, after which, and before delivery, by an arrangement between the principals and surety who *first* signed the note, his name was erased therefrom without the knowledge or consent of the other sureties; and the note was then delivered to the payee in a condition which shewed upon its face that the name of the surety who *first* signed the same had been erased; whereupon the note was received with knowledge of the relation of principal and surety existing between the makers, it was *held*—1st. That the discharge of the surety released the co-sureties who signed the note when his name was upon it. 2d. That the payee received the note under circumstances which would put a reasonably prudent man upon inquiry, and he was charged with knowledge of the rights of the co-sureties. It was also *held*, that if the makers of the note were all principals the erasure of the name of one would be a discharge of the others only *pro tanto*.—*McCramer* v. *Thompson et al.*, (S. C., Iowa) 7 Am. Law Reg. 92.

Railway Company.

1. Where a passenger on a railway train is injured by the misconduct of a fellow-passenger, the company is liable only in case there was negligence in its officers in not making proper efforts to prevent the injury.

Railroad companies are bound to furnish men enough for the ordinary demands of transportation, but not a police force adequate to extraordinary emergencies, as to quell mobs by the wayside.

It is negligence in a conductor to voluntarily admit improper persons or undue numbers into the cars.

Where the evidence shows that an excited crowd, at a way station, among whom were drunken and disorderly persons, rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, it is error in the court to submit that to the jury as evidence from which they may find negligence in the conductor in admitting in the cars either improper persons or undue numbers.

In case of fighting or disorder in the cars, the conductor must at once do all he can to quell it. If necessary, he should stop the train, call to his aid the engineer, firemen, all the brakesmen and willing passengers, lead the way himself, and expel the offenders, or demonstrate by an earnest experiment that the undertaking is impossible.—*Pittsburgh, Fort Wayne and Chicago Railway Co.* v. *Hinds and Wife.* (S. C., Penn.) 7 Am. Law Reg. 14.

2. Where a person employed for a certain term at a fixed salary payable monthly is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due.—*Huntington* v. *Ogdensburgh and Lake Champlain Railroad Company*, 7 Am. Law. Reg. 153.

See Carrier.

Retainer.

Held, that an advocate has a right of action for a retainer, but he cannot recover from his client more than the fees fixed by the Tariff,

unless he can prove an agreement with his client that more than the taxable fees should be paid.

Held (per Badgley, J.), that there is no right of action in Lower Canada for a retainer.—*Grimard, appellant* v. *Burroughs, respondent*, 3 L. C. L. J. 85.

Squatter.

The defendant squatted upon land of an absentee (who was represented, however, by an agent), cleared and improved the land, and paid the taxes for three years.

Held, in an action under C. S. L. C. cap. 45, that the defendant was entitled to the value of his improvements, less the estimated value of the rents, issues and profits during his occupation.—*Ellice, appellant* v. *Courtemanche, respondent*, 3 L. C. L. J. 126.

Surgeon.

There is an implied obligation on a man holding himself out to the community as a surgeon, and practising that profession, that he should possess the ordinary skill in surgery of the profession generally. Where, by improper treatment of an injury by a surgeon, the patient must inevitably have a defective arm, the surgeon is liable to action, even though the mismanagement or negligence of those having the care of the patient may have aggravated the case and rendered the ultimate condition of the arm worse than it otherwise would have been. The liability of the surgeon being established, the showing of such mismanagement or negligence only affects the measure and amount of damages. This case distinguished from those where the contributory negligence on the part of the patient entered into the creation of the cause of action, and not merely supervened upon it, by way of aggravating the damaging results. The plaintiff broke his arm, and called upon the defendant, a professed surgeon, to set it, which he did; but the evidence showed that by the improper manner of dressing the arm and subsequent negligence of the defendant, the plaintiff must necessarily have a defective arm, irrespective of the management of those having the care of the plaintiff. *Held*, that the defendant was not entitled to have the court charge the jury that if the damage or injury to the plaintiff's arm resulted in part from the negligence of those having the care and management of the plaintiff, that the plaintiff could not recover, the court having given a full and satisfactory charge upon every other feature and theory of the defence.—*Wilmot* v. *Howard*, 39 Vermont Rep.

Telegraph Company.

Telegraph companies, in the absence of any provision of the statute, are not common carriers, and their obligations and liabilities are not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged. They do not become insurers against errors in the transmission of messages, except so far as by their rules and regulations, or by contract, they choose to assume that position.

When a person writes a message, under a printed notice requesting the company to send such message according to the conditions of such notice: *held*, that the printed blank was a general proposition to all persons of the terms and conditions upon which messages would be sent, and that by writing said message and delivering it to the company, the party must be held as accepting the proposition, and that such act becomes a contract upon those terms and conditions.

Where a telegraph company established regulations to the effect that it would not be responsible for errors or delay in the transmission of unrepeated messages; and further, that it would assume no liability for any error or neglect committed by any other company, by whose lines a message might be sent in the course of its destination: *held*, that such regulations were reasonable and binding on those dealing with the company.—*Western Union Telegraph Co.* v. *Carew*, (S. C., Mich.) 7 Am. Law Reg. 18.

Vendor and Purchaser.

Where a vendor of real estate, on default in the terms of payment by vendee, goes into a court of equity and has the contract declared void and of no effect, and is remitted to his original title and possession, this is not a proceeding in rescission, but in affirmance of the contract, and does not entitle the vendee to recover back the part of the purchase money already paid.

A purchaser of real estate, who has paid part of his purchase-money or done an act in part performance of his agreement and then refuses to complete his contract, the vendor being willing to do his part, will not be permitted to recover back what has thus been advanced or done.

A purchaser after payment of part of the purchase-money, intended to abandon the contract, and the vendor promised, if he would pay up arrears, to indulge him for a certain time. The purchaser paid up the arrears, but the vendor enforced his payment within the

time (as alleged) that he promised to forbear. *Held*, that there was no consideration for the promise, the purchaser having done nothing he was not already bound to do by his original contract.—*Hansbrough et al.* v. *Peck*, (Sup. C., U. S.) 7 Am. Law. Reg. 74.

SPRING CIRCUITS, 1868.

Eastern Circuit.

The Hon. Mr. Justice J. Wilson.

Pembroke	Wednesday	Mar.	11.
Perth	Monday	Mar.	16.
Brockville	Thursday	Mar.	19.
Ottawa	Tuesday	Mar.	24.
Kingston	Thursday	Mar.	26.
Cornwall	Tuesday	April	14.
L'Original	Tuesday	April	21.

Midland Circuit.

The Hon. Mr. Justice A. Wilson.

Napanee	Tuesday	Mar.	17.
Belleville	Monday	Mar.	23.
Cobourg	Tuesday	Mar.	31.
Whitby	Thursday	April	9.
Peterborough	Thursday	April	16.
Lindsay	Tuesday	April	21.
Picton	Wednesday	April	29.

Niagara Circuit.

The Hon. Mr. Justice Morrison.

Milton	Monday	Mar.	16.
Barrie	Tuesday	April	7.
Hamilton	Tuesday	April	14.
Welland	Tuesday	April	28
St. Catharines	Monday	May	4.
Owen Sound	Thursday	May	7.

Oxford Circuit.

The Hon. Mr. Justice Hagarty.

Guelph	Monday	Mar.	16.
Woodstock	Monday	Mar.	23.
Berlin	Monday	Mar.	30.
Stratford	Monday	April	6.
Brantford	Monday	April	20.
Cayuga	Tuesday	April	28.
Simcoe	Tuesday	May	5.

Western Circuit.

The Hon. the Justice of the Common Pleas.

Walkerton	Wednesday	Mar.	18.
Goderich	Tuesday	Mar.	24.
Sarnia	Tuesday	Mar.	31.
London	Monday	April	6.
St. Thomas	Wednesday	April	15.
Chatham	Tuesday	April	21.
Sandwich	Tuesday	April	28.

Home Circuit.

The Hon. the Chief Justice of Ontario

County of York	Monday	Mar.	16.
County of Peel	Monday	Mar.	30.
City of Toronto	Monday	April	6.

APPOINTMENTS TO OFFICE.

NOTARIES.

JAMES HARSHAW FRASER, of the City of London, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

RICHARD H. R. MUNRO, of the City of Hamilton, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

JOHN EDWARD ROSE, of the City of Toronto, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

ELIJAH WESTMAN SECORD, of the Village of Madoc, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

LOUIS BERNARD DOYLE, of the Town of Goderich, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

JOHN BURNHAM, of the Town of Peterborough, to be a Notary Public in and for the Province of Ontario. (Gazetted 11th January, 1868.)

CORONERS.

WILLIAM JOHNSTON, of the Town of Brampton, Esquire, M.D., to be Associate Coroner in and for the County of Peel. (Gazetted 18th January, 1868.)

JOHN GRANT, of the Town of Brampton, Esquire, M.D., to be Associate Coroner in and for the County of Peel. (Gazetted 18th January, 1868.)

THOMAS GRAHAM PHILIPS, of the Village of Grahamsville, Esquire, M.D., to be Associate Coroner in and for the County of Peel. (Gazetted 18th January, 1868.)

CHARLES E. BONNELL, of the Village of Bobcaygeon, to be Associate Coroner in and for the County of Ontario. (Gazetted 18th January, 1868.)

THE NEW YORK CIVIL CODE.

During the long vacation we printed some parts of this code which appeared to us to be admirable. We have since had occasion to look into it more closely, with the especial object of seeing how its authors treated one of the subjects set by the commissioners in England for specimen digests, viz., Easements. We were amazed: the brevity of the digest is simply ludicrous. A subject to which Gale devoted an erudite treatise (which is now entering a fourth edition), and to which, moreover, Dr. Washburn, an American writer, has given his very careful and learned attention in a far larger work than Gale's, which has just been published, is disposed of in the New York Code in a few paragraphs. For practical purposes it is useless—it is a mere bite out of a colossal fruit. As a guide to those inclined to compete for the honor of framing specimen digests of English law it affords no assistance; indeed it is rather discouraging, as showing how great must be the labor, how acute the intellectual vigor which shall reduce a branch of law to a set of propositions capable of invariable and rapid application.—*The Law Times.*

DIARY FOR MARCH.

1. SUN.. 1st *Sunday in Lent.* St. David.
2. Mon.. Last day for notice of trial County Court. Recorder's Court sits. Last day for setting down for re-hearing.
4. Wed.. Last day for notice re-hearing.
8. SUN.. 2nd *Sunday in Lent.*
10. Tues.. Quarter Sessions and County Court Sittings in each County.
12. Thurs. Error and Appeal Sittings. Re-hearing Term commences.
15. SUN.. 3rd *Sunday in Lent.*
16. Tues.. *St. Patrick's Day.*
22. SUN.. 4th *Sunday in Lent.*
25. Wed.. *Lady Day.* Appeals from Chancery Chambers.
29. SUN.. 5th *Sunday in Lent.*

THE

Canada Law Journal.

MARCH, 1868.

THE CHIEF JUSTICE OF ONTARIO.

We are glad to learn that Chief Justice Draper has at length been induced to take a short repose from the severe and unremitting labours incident to his high position.

For nearly twenty-one years, his pre-eminent abilities have been devoted to the service of his country, in a judicial capacity. His position has been no sinecure; and if any man ever earned a holiday, that man is he whom we of the professional are proud to call our Chief.

His request for six months' leave of absence, made at the urgent solicitation of his many friends, was acceded to with the alacrity of a government that had the good sense to appreciate the services of such an able and faithful servant; and though his absence even for a short time will be a severe loss, it will be borne patiently in the knowledge that he is enjoying and benefitting by his holiday, and in the confident hope that we shall soon again see him take his place in renewed health and strength.

MARRIAGE.

Whilst discussing the validity of Marriages solemnized between Christians it may not be uninteresting to notice a decision that has been given in the Superior Court at Montreal, in the Province of Quebec, as to the validity of a marriage celebrated after the manner of one of the Indian nations of this continent.

The marriage, the validity of which was disputed in the case of *Connolly* v. *Woolrich and Johnson et al.*, was one of an unusual character, at least in this age of the world's history, having been contracted by a Christian with a Pagan, a daughter of one of the chiefs of the Cree nation.

The case is reported at great length in the *Lower Canada Jurist*, vol. xi., p. 197, from which we take a summary of the case. From this it will be seen that a number of points, very interesting in themselves, but only incidentally connected with the main question, are touched upon. The facts of this curious case were as follows:

William Connolly was born about 1786, at Lachine, in Lower Canada, which was his original domicile, and remained there till the age of 16, when he went to the North West territory, where he resided at different posts of the North West Company for 30 years. In 1808 at the age of 17 years, he took to live with him, as his squaw or Indian wife, an Indian girl, the daughter of an Indian Chief, with the consent of her father, and cohabited with her as his squaw or Indian wife, according to the usages and customs of the Cree nation to which she belonged. They cohabited in the Indian country, and were faithful to one another there for 28 years, and had a family of six children. They came to Lower Canada in 1831 and cohabited there for a short time as husband and wife. In 1832 Connolly left his squaw, and had a marriage ceremony, after a dispensation by the Bishop, celebrated between himself and his second cousin Julia Woolrich, according to the rites of the Roman Catholic Church in Lower Canada where he continued to be, and he, from that time, till his death, in 1849, cohabited with her as wife.

Mr. Justice Monk, who heard the cause, gave a very elaborate judgment, which, with his full statement of the case is not contained in less than 67 closely printed pages of the *Jurist*. The principal points decided by him incidental to question principally involved, were shortly these:—

That though the Hudson's Bay Company's Charter is of doubtful validity, yet if valid, the chartered limits of the company did not extend westward beyond the navigable waters of the rivers flowing into the Bay:

That the English Common law, prevailing in the Hudson's Bay territories, did not apply to

natives who were joint occupants of the territories; nor did it supersede or abrogate, even within the limits of the Charter, the laws, usages, and customs of aborigines:

That no other portions of the English Common law, than that introduced by King Charles' Charter obtain in the territories of the Company:

That the English law was not introduced into the North West territories by the cession by France to England, nor by royal Proclamation subsequent to that date:

That neither the decrees of the Council of Trent, nor the ordinance of the French kings, nor the British Marriage Acts, were law or in force at Rat River, or in any part of the North West Territories, in 1803:

The answers to the main questions were not arrived at without a mass of evidence being taken, much of which we should not look upon as altogether relevant to the issue, and which did not shew the habits of one of the principal "protectors" of the settlement, to be the most moral in the world. The points decided with respect to the law of marriage, were the following:

That a marriage contracted where there are no priests, no magistrates, no civil or religious authority, and no registers, may be proved by oral evidence, and that the admission of the parties combined with long cohabitation and repute will be the best evidence:

That such a marriage, though not accompanied by any religious or civil ceremony, is valid, and that an Indian marriage between a Christian and a woman of that nation or tribe is valid, notwithstanding the assumed existence of polygamy and divorce at will, which are no obstacles to the recognition by our Courts of a marriage contracted according to the usages and customs of the country:

That a Christian marrying a native according to their usages, cannot exercise in Lower Canada the right of divorce or repudiation at will, though this is a right which, together with polygamy, obtains among the Crees:

That an Indian marriage, according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognized as a valid marriage by our Courts, and that such a marriage is valid: the Indian custom being, as regards the jurisdiction of this Court, a foreign law of marriage, which obtains however within the possessions of the Crown of England, and which cannot be disregarded so long as they are unaltered:

That Connolly never lost his domicile of birth and never acquired one in the Indian Territory.

A late decision in England shows that a somewhat different view of the law is there taken in cases where a marriage is contracted between a man and woman who profess a faith allowing polygamy, in a country where polygamy is lawful; it having been held that such a marriage was not a marriage as understood in Christendom; and, though valid by the *lex loci*, and though both parties were single and competent to contract marriage, the English matrimonial court will not recognize such as a valid marriage in a suit by one of the parties for dissolution of marriage on the ground of the other's adultery—*Hyde* v. *Woodmansee*, Law Rep. 1 P. & D. 130.

A somewhat similar case to that decided in Lower Canada was the English case of *Armitage* v. *Armitage*, (L. R. 3 Eq.: 343—noted in Dig. of Eng. Law Rep. *ante* vol. III., N. S., p. 301.) But in that case the evidence before the court as to the alleged marriage was not very satisfactory, being that of the supposed husband, who said he was a British subject, born abroad, of British parents; that he came to New Zealand in 1828, and had lived there ever since; that, in 1829, he married Tuhi Tuhi, and that such marriage was solemnized according to the laws and customs then in force in New Zealand; that New Zealand was not then a British colony, and there was not then a Christian minister, nor any register of marriages, in the island; and that Tuhi Tuhi had always lived and still lived with him as his wife. He did not state his parents' name. He said that Hannah, before her marriage, was called Tuhi Tuhi, and not by her father's name, in conformity with the customs of the natives of New Zealand, but there was no evidence what the laws and customs of such natives were. But no evidence was given as to the laws and customs of the natives respecting marriages. The Court held that this evidence was insufficient to establish either of these points.

John Gwynne, Esq. Q.C. has been appointed to take the Assizes for York and Toronto, in the absence of the Chief Justice.

JUDGE'S NOTES.

It may be useful to state what is believed to be the practice of the most experienced of the judges, with reference to giving or withholding copies of their notes taken at *Nisi Prius*.

As we understand it, the judge's notes are intended, in the first place, for the use of the judge himself, or for the information of the proper court, and not for the use of the public or of either party to the cause. Copies therefore will be refused, unless it clearly appears that they are desired for the benefit of both parties, as where the parties have consented that they shall be used as the evidence between them on a new trial, or in making up appeal books, or under some other special circumstances which might possibly arise.

It is thought that an indiscriminate liberty to use judges notes might lead to most injurious results, and be made a means of improperly harassing witnesses, and particularly because, as a general thing, the evidence is not pretended to be taken down in the exact words of witnesses, so that their meaning might be misunderstood, or statements might be omitted, which would explain apparent inaccuracies or contradictions; or the production of copies of the notes of evidence at a former trial might at a subsequent trial lead to unseemly disputes as to whether the judge had or had not taken down the evidence correctly.

The rule is a wholesome one, and not as generally known or understood as might be supposed.

We direct attention to the remarks of a correspondent on the operation of the Insolvent Act, and particularly with reference to what he says with reference to the anomalous position in which official assignees place themselves by a desire to increase their business and their fees.

The present system, it is said, tends to make those assignees, who live by the number of assignments made to them, the agents rather of insolvents than of their creditors. Nothing is more probable than this, and our correspondent forcibly points out the evils arising from it. There is a strong temptation placed in the way of an assignee to facilitate the success of the insolvent in obtaining his discharge, at the expense of the right which creditors have to obtain as much as possible from the insolvent's estate.

Curiosity, always rife as to the appointment of new officials, particularly where the offices are of much responsibility or of large emolument, has almost died away with reference to the County Judgeship of York. After such long delay we may well expect that the appointment will be such as will be thoroughly satisfactory to the profession and the public.

ACTS OF LAST SESSION.

We make room in this number for such of the Acts of the Session of the Parliament of Ontario, which has just closed, as will be interesting to our readers, or useful in their practice. Promptitude on our part in this respect will be the more appreciated as these Acts, so far as we know, came into operation on the day they were assented to, and therefore long before the public could obtain copies of them. We must confess that we are unable to discover the necessity for the *immediate* operation of any of them; if they were to come into force a month or two hence, when they might be ready for general distribution, no harm would have been done, and perhaps much mischief prevented, which may have arisen from the want of knowledge of their contents.

Headlong legislation seems to be the order of the day, and we shall have to bestir ourselves to keep in view the actual state of the statute law through the cloud of acts, passed and promised, which our "new brooms" have stirred up.

AN ACT

To amend the Common Law Procedure Act.

[Assented to March 4, 1868.]

Whereas it is desirable to amend the Common Law Procedure Act, therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. The three hundred and twenty-fourth Section of the Common Law Procedure Act is hereby repealed, and the following Section shall be substituted for and stand in lieu thereof

"If the Plaintiff in any action of trespass or trespass on the case, recovers by the verdict of a jury, less damages than eight dollars, such plaintiff shall not be entitled to recover in respect of such verdict any costs whatever, whether the verdict be given on an issue tried, or judgment has passed by default, unless the Judge or presiding officer before whom such verdict is obtained immediately afterwards, or at any future time to which he may postpone the consideration of the matter, certifies on the

back of the Record, in the form hereinafter prescribed, to entitle the plaintiff to full costs; and in case such certificate be not granted then, the defendant in such action shall be entitled to set off his costs against such verdict and recover judgment and issue execution against the plaintiff for the balance of such costs as between Attorney and client, unless the said Judge or presiding officer shall certify as hereinafter provided upon the Record, in manner aforesaid, that the defendant is not entitled to recover his costs in the cause against the plaintiff."

2. The three hundred and twenty-eighth section of the Common Law Procedure Act is hereby repealed, and the following section shall stand in the place thereof:

"In case a suit of the competence of a County Court be brought in either of the Superior Courts of the Common Law, or in case a suit of the proper competence of a Division Court be brought in either of such Superior Courts, or in a County Court, the costs shall be taxed in the manner following:

(1.) In case the Judge, who presides at the trial of the cause, certifies in open Court, immediately after the verdict has been rendered, or at any future time to which he may then postpone the consideration of granting or refusing the certificate, that it is a fit cause to be withdrawn from the County Court or Division Court, as the case may be, and brought in the Superior Court or a County Court, as the case may be, the plaintiff shall recover his costs of suit according to the practice of the Court in which the action is brought, in like manner, and subject to the like deduction or set off, for costs of the issues upon which the defendant may have succeeded, as he would have done and would have been subject to in case his suit had been of the proper competence of the Court in which the action is brought.

(2.) In case the Judge who presides at the trial of the cause certifies at the time aforesaid that the plaintiff had reasonable ground for believing he had the right of withdrawing his cause from the County Court or Division Court, as the case may be, and bringing it in the Superior Court or a County Court, as the case may be, and that the defendant, without just reason, defended the same, the plaintiff shall recover his costs of suit according to the practice of the Court in which the action should have been brought, in like manner, and subject to the like deduction or set-off for costs of issues upon which the defendant may have succeeded, as he would have done and would have been subject to in case he had brought his action in such inferior court.

(3.) In case the Judge, who presides at the trial, shall not certify as aforesaid, the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between attorney and client, and so much thereof as exceeds the taxable costs of defence which would have been incurred in the County Court or Division Court, shall, in entering judgment, be set off and allowed by the taxing officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed, and the amount of the verdict if it be necessary, and if the amount of the costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff."

3. The Certificate may be as follows: "I certify to entitle the plaintiff to full costs."

Or, "I certify to prevent the defendant deducting costs."

Or, "I certify to entitle the plaintiff to County (or Division) Court costs."

4. The two hundred and seventy-first section of the said Common Law Procedure Act is repealed, and the following clause substituted therefor:—

"(1.) In case a part only be made by the Sheriff on, or by force of any execution against goods and chattels, the Sheriff shall be entitled besides his fees and expenses of execution, to poundage only upon the amount so made by him, whatever be the sum endorsed upon the writ, and in case the personal estate, except chattels real, of the defendant or defendants be seized or advertised, on or under an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually made by the sheriff on or by force of such execution, the Sheriff shall be entitled to the fees and expenses of execution and poundage only on the value of the property seized, not exceeding the amount endorsed on the writ, or such less sum as a Judge of the Court out of which the writ issued may deem reasonable under the circumstances of the case. Provided, also, in cases of writs of execution upon the same judgment to several Counties wherein the personal estate of the judgment debtor or debtors, has been seized or advertised, but not sold by reason of satisfaction having been obtained under or by virtue of a writ in some other County, and no money has been actually made on such execution, the Sheriff shall not be entitled to poundage, but to mileage and fees only for the services actually rendered and performed by him, and the Court out of which the writ issued or any Judge thereof, may allow him a reasonable charge for such services, in case no special fee therefor be assigned in any table of costs."

"(2.) In case where any person liable on any execution shall be dissatisfied as to the amount of poundage fees and expenses of execution that any Sheriff may claim under the tariff of fees and allowances now in force, or under this Act, he may, before or after payment thereof, apply to the Court out of which such writ issued, or to any Judge thereof, and if, upon a statement of the whole facts, the said Court or Judge, after notice to the Sheriff, is of opinion that such amount is more than reasonable, notwithstanding it may be according

to the tariff, or this Act, the same shall be reduced or ordered to be refunded, upon such terms as to costs or otherwise as the court or Judge may think fit to impose.

AN ACT

To secure Free Grants and Homesteads to actual Settlers on the Public Lands.

[Assented to March 4, 1868.

Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. This Act shall be called and known as "The Free Grants and Homestead Act of 1868," and may be so cited or designated in all Acts or proceedings whatsoever.

2. The Statute of the Parliament of the late Province of Canada, passed in the twenty-third year of Her Majesty's Reign, entitled "An Act respecting the Sale and Management of the Public Lands," may be cited and designated in all Acts and proceedings as "The Public Lands Act of 1860," and is the Act hereinafter so designated.

3. The thirteenth section of "The Public Lands Act of 1860" is hereby repealed, except that Patents may issue for all lands heretofore located as free grants under that section, as if this Act had not been passed.

4. The Lieutenant-Governor in Council may appropriate any Public Lands considered suitable for settlement and cultivation, and not being Mineral Lands or Pine Timber Lands, as Free Grants to actual Settlers, under such regulations as shall from time to time be made by Order in Council, not inconsistent with the provisions of this Act.

5. Such grants or appropriations shall be confined to lands surveyed or hereafter to be surveyed, situate within the tract or territory composed of the Districts of Algoma and Nipissing, and of the lands lying between the Ottawa River and the Georgian Bay, to the west of a line drawn from a point opposite the south-east angle of the Township of Palmerston north-westerly along the western boundaries of the Townships of North Sherbrooke, Lavant, Blithfield, Admaston, Bromley, Stafford and Pembroke to the Ottawa River, and to the north of the rear or northerly boundaries of the Townships of Oso, Olden, Kennebec, Kaladar, Elzevir, Madoc, Marmora, Belmont, Dunamer, Smith, Ennismore, Sommerville, Laxton, Carden, Rama, and of the River Severn.

6. The person to whom any land may be allotted or assigned under such regulations for a free grant thereof, shall be considered as located for said land within the meaning of this Act, and is hereinafter called the Locatee thereof.

7. No person shall be located for any land under this Act or said regulations unless such person shall be of the age of eighteen years or upwards, nor shall any person be so located for any greater quantity than one hundred acres.

8. Before any person shall be located for any land as aforesaid, such person shall make affidavit to be deposited with the Agent authorized to make such location, that he or she has not been located for any land under this Act or under said regulations, and that he or she is of the age of eighteen years or upwards, and believes the land for which he or she applies or desires to be located, is suited for settlement and cultivation, and is not valuable chiefly for its mines minerals or pine timber, and that such location is desired for his or her benefit and for the purpose of actual settlement and cultivation of such land, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever, nor for the purpose of obtaining, possessing or disposing of any of the pine trees growing or being on the said land, or any benefit or advantage therefrom, or any gold, silver, copper, lead, iron, or other mines or minerals, or any quarry or bed of stone, marble or gypsum thereon.

9. No patent shall issue for any land located under this Act or under said regulations until the expiration of five years from the date of such location, nor unless or until the Locatee or those claiming under him or some of them shall have performed the following settlement duties, that is to say, shall have cleared and have under cultivation at least fifteen acres of the said land, whereof at least two acres shall be cleared and cultivated annually during the five years next after the date of the location, to be computed from such date, and have built a house thereon fit for habitation at least sixteen feet by twenty feet, and shall have actually and continuously resided upon and cultivated the said land for the term of five years next succeeding the date of such location, and from thence up to the issue of the Patent, except that the Locatee shall be allowed one month from the date of the location to enter upon and occupy the land, and that absence from the said land for in all not more than six months during any one year, (to be computed from the date of the location) shall not be held to be a cessation of such residence, provided such land be cultivated as aforesaid.

On failure, in performance of the settlement duties aforesaid, the location shall be forfeited, and all right of the Locatee, or of any one claiming under him or her, in the land shall cease.

10. All Pine trees growing or being upon any land so located, and all gold, silver, copper, lead, iron, or other mines or minerals, shall be considered as reserved from said location, and shall be the property of Her Majesty, except that the Locatee or those claiming under him or her, may cut and use such trees as may be necessary for the purpose of building, fencing, and fuel, on the land so located, and may also cut and dispose of all trees required to be removed, in actually clearing said land for cultivation, but no pine trees (except for necessary building, fencing, and fuel as aforesaid,) shall

be cut beyond the limit of such actual clearing before the issuing of the Patent, and all pine trees so cut and disposed of (except for the necessary building, fencing, and fuel as aforesaid), shall be subject to the payment of the same dues, as are at the time payable by the holders of licenses to cut timber or saw logs. All trees remaining on the land at the time the Patent issues shall pass to the Patentee.

11. On the death of the Locatee, whether before or after the issue of the Patent for any land so located, all his then right and interest in and to such land shall descend to and become vested in his widow during her widowhood in lieu of dower, in case there be such widow surviving such Locatee, but such widow may elect, to have her dower in such land in lieu of the provision aforesaid.

12. Neither, the Locatee, nor any one claiming under him or her, shall have power to alienate, (otherwise than by devise) or to mortgage or pledge any land located as aforesaid, or any right or interest therein before the issue of the Patent.

13. No alienation (otherwise than by devise) and no mortgage or pledge of such land, or of any right or interest therein by the Locatee after the issue of the Patent, and within twenty years from the date of such location, and during the life-time of the wife of such Locatee, shall be valid or of any effect, unless the same be by Deed, in which she shall be one of the grantors with her husband, nor unless such Deed is executed by her in the same presence, and there are the same examination and certificate and at the same time, as shall be at the date of such deed required by Law in the case of married women conveying their real estate.

14. No land located as aforesaid, nor any interest therein, shall in any event be or become liable to the satisfaction of any debt or liability contracted or incurred by the Locatee, his widow, heirs, or devisee, before the issuing of the Patent for such land: After the issuing of the Patent for any such land, and while such land or any part thereof or any interest therein is owned by the locatee or his widow, heirs, or devisees, such land, part or interest, shall during twenty years next after the date of such location be exempt from attachment, levy under execution or sale for payment of debts, and shall not be or become liable to the satisfaction of any debt or liability contracted or incurred before or during that period, save and except any debt secured by a valid mortgage or pledge of such land made subsequently to the issuing of the Patent therefor.

15. Nothing in this Act shall be construed to exempt any land from levy or sale for rates or taxes, now or hereafter legally imposed.

16. Every patent to be issued for any land located as aforesaid shall state in the body thereof, the name of the original Locatee of the said land, and the date of the said location, and that the said Patent is issued under the authority of this Act.

17. This Act shall be taken and read as part of "The Public Lands Act of 1860."

AN ACT

Respecting Overholding Tenants.

[Assented to March 4, 1868.]

Whereas, it is expedient to provide a less expensive and more expeditious mode of proceeding against tenants of occupants overholding wrongfully, than is provided by law; Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

1. The Act of the late Parliament of Canada, passed in the twenty-seventh and twenty-eighth year of Her Majesty's reign, chapter thirtieth, and intituled "An Act to afford a more expeditious remedy as regards tenants overholding, wrongfully, in Upper Canada," is hereby repealed; Provided, always, that all proceedings had, or taken under the said Act, shall not be affected by the repeal of the said Act, but the same may be carried on and finally determined under the provisions of the said Act as the same might be if the said Act had not been repealed.

2. In case a tenant, after his lease or right of occupation whether created by writing or by verbal agreement has expired, or been determined, either by the landlord or the tenant, by a notice to quit or notice pursuant to a proviso in any lease or agreement in that behalf, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, upon demand made in writing, to go out of possession of the land demised to him or which he has been permitted to occupy, his landlord or the agent of his landlord, may apply to the County Judge of the county, or union of counties, in which such land lies, in term or in vacation, and wherever such Judge may then be, setting forth on affidavit the terms of the demise or right of occupation, if verbal, and annexing a copy of the instrument creating or containing such demise or right of occupation, if in writing; or if a copy cannot be so annexed by reason of the said writing being mislaid, lost or destroyed, or being in the possession of the tenant or from any other cause, then annexing a statement setting forth the terms of the demise or occupation and the reason why a copy of the said writing cannot be annexed, and also annexing a copy of the demand made for the delivering up of possession, and stating also the refusal of the tenant to go out of possession, and the reasons given for such refusal, if any were given, adding such explanation in regard to the ground of such refusal as the truth of the case may require; and this section shall extend, and be construed to apply to tenancies from week to week, from month to month,

from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations.

3. If, upon such affidavit, it appears to such County Judge that the tenant wrongfully holds, without colour of right, and that the landlord is entitled to possession, such Judge shall appoint a time and place at which he will enquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, and whether the tenant without any colour of right holds the possession against the right of the landlord, and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise.

4. Notice in writing of the time and place so appointed by the County Judge for holding such inquiry, shall be, by the landlord, served upon the tenant or left at his place of abode, at least three days before the day so appointed, if the place so appointed be not more than twenty miles from the tenant's place of abode, and one day in addition for every twenty miles above the first twenty, reckoning any broken number above the first twenty as twenty miles, to which notice shall be annexed a copy of the affidavit on which the appointment was obtained, and of the papers attached thereto.

5. If at the time and place appointed, as aforesaid, the tenant, having been duly notified, as above provided, fails to appear, the County Judge, if it appears to him that the tenant holds without color of right, may order a writ to issue to the sheriff, in the Queen's name, commanding him forthwith to place the landlord in possession of the premises in question; but if the tenant appears at such time and place, the County Judge shall, in a summary manner, hear the parties, and examine into the matter, and shall administer an oath or affirmation to the witnesses adduced by either party, and shall examine them; and if after such hearing and examination it appears to the County Judge that the case is clearly one coming under the true intent and meaning of the second section of this Act, and that the tenant holds without color of right against the right of the landlord, then he shall order the issue of such writ, as aforesaid, otherwise he shall dismiss the case; and the proceedings, in any such case, shall form part of the records of the County Court: and the said writ may be in the form or to the effect of forms number one or number two, in Schedule A, forming part of this Act, according as the tenant is ordered to pay costs or otherwise, and on any such examination the parties shall be competent witnesses.

6. Where any such writ has been issued, either of the superior courts of common law for the Province of Ontario, may, on motion, before the end of the second term after the issue of such writ, command such County Judge to send up the proceedings and evidence in the case to such superior court certified under his hand, and may examine into the proceedings, and if they find cause may set aside the same, and may, if necessary, order a writ to issue to the sheriff, commanding him to restore the tenant to his possession, in order that the question of right, if any appear, may be tried, as in other cases of ejectment.

7. The judges of the superior courts of common law, for the Province of Ontario, may, from time to time, make such orders respecting costs, in cases under this Act, as to them may seem just; and the County Judge, before whom any such case is brought, may, in his discretion, award costs therein, according to any such order then in force, and if no such order is in force, reasonable costs, in his discretion, to the party entitled thereto; and in case the party complaining is ordered to pay costs, execution may issue out of the county court for such costs as in other cases in the county court wherein an order is made for the payment of costs.

8. The County Judge may cause any person to be summoned as a witness to attend before him in any such case, in like manner as witnesses are summoned in other cases in the county court, and under like penalties for non-attendance, or refusing to answer, or wilfully swearing, or affirming falsely in such case.

9. Nothing herein contained shall prevent any landlord from proceeding under the sixty-third, and ten next following sections of the Act respecting ejectment, chapter twenty-seven of the Consolidated Statutes of Upper Canada, if he thinks it advisable to proceed under the said sections, or shall in any way affect the powers of any judge or judges of the superior courts under the same, or under sections fifty-seven, fifty-eight and fifty-nine of the said Act, or shall prejudice or affect any other right or right of action or remedy which landlords may possess in any of the cases herein provided for.

10. In the case of tenancies from week to week and from month to month, a week's notice to quit and a month's notice to quit respectively, ending with the week or the month, as the case may be, shall be deemed sufficient notice to determine, respectively, a weekly or monthly tenancy.

11. The proceedings under this Act shall be entitled in the County Court of the County or union of Counties in which the premises in question are situate, and shall be styled "In the matter of (giving the name of the party complaining) Landlord against (giving the name of the party complained against) Tenant."

12. Service of all papers and proceedings under this Act shall be deemed to have been properly served if made as required by law, in respect of writs and other proceedings in actions of ejectment.

13. In this Act the word "tenant" shall mean and include an occupant, a sub-tenant, under-tenant, and his and their assigns and legal representatives; and the word "landlord" shall mean and include the lessor, owner, the party giving or permitting the occupation of the premises in question and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives.

14. The following is the Schedule A referred to in this Act:

FORM No. 1.

Ontario, to wit: Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

[L. S.]

To the Sheriff of the ——— Greeting:

Whereas ——— Judge of the County Court of ——— by his order dated the ——— day of ——— A.D. 186 —, made in pursuance of the "Act respecting Overholding Tenants," on the complaint of ——— against ——— adjudged that ——— was entitled to the possession of ——— with the appurtenances in your Bailiwick, and that a Writ should issue out of our said Court accordingly, and also ordered and directed that the said ——— should pay the costs of the proceedings had under the said Act, which by our said Court have been taxed at the sum of ———. Therefore, we command you, that without delay you cause the said ——— to have possession of the said land and premises, with the appurtenances: And we also command you that of the goods and chattels of the said ——— in your Bailiwick, you cause to be made ——— being the said costs so taxed by our said Court as aforesaid, and have that money in our said Court immediately after the execution hereof, to be rendered to the said ———, and in what manner you shall have executed this Writ make appear to our said Court, immediately after the execution hereof, and have there then this Writ.

Witness ——— Judge of our said Court at ——— this ——— day of ——— A.D. 186—

——— *Clerk.*

Issued from the Office of the Clerk of the County Court of the County, or United Counties of ——— *Clerk.*

FORM No. 2.

Ontario, to wit: Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

[L. S.]

To the Sheriff of the ——— Greeting:

Whereas ——— Judge of the County Court of the ——— by his order dated ——— day of ——— A.D. 186 —, made in pursuance of the "Act respecting Overholding Tenants," on the complaint of ——— against ——— adjudged that ——— was entitled to the possession of ——— And ordered that a writ should issue out of our said Court accordingly: Therefore we command you that without delay you cause the said ——— to have possession of the said land and premises, with the appurtenances, and in what manner you shall have executed this Writ make appear to our said Court, immediately after the execution hereof and have there then this Writ.

Witness ——— Judge of our said Court at ——— this ——— day of ——— A.D. 186—

——— *Clerk.*

Issued from the office of the Clerk of the County Court of the County or United Counties of ——— *Clerk.*

AN ACT

As to Executions against Goods and Lands.

[Assented to March 4, 1868..]

Whereas by an Act passed in the session of Parliament held in the twenty-ninth and thirtieth years of Her Majesty's reign, chapter forty-two, intituled "An Act to Amend the Common Law Procedure Act of Upper Canada," the principle is recognized of allowing persons who have priority of executions in regard to goods, to retain the same in regard to lands; but difficulties exist in applying the said Act by reason of its enactment that the Sheriff shall return writs against goods only, in the order of priority in which they come to his hands, whilst, nevertheless, a person having a first execution against goods is entitled to renew the same indefinitely without any return thereof: Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

1. Sections five and six of the said Act, and the two hundred and fifty-second section of the Common Law Procedure Act, are hereby repealed and the following substitued therefor:—

"Any person who now is or hereafter may become entitled to issue a writ of execution against goods and chattels, may, at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable, and deliver the same to the Sheriff to whom the writ against the goods is directed, at or after the time of delivery to him of the writ against goods, and either before or after any return thereof; Provided, always, that the Sheriff shall not expose the lands for sale, or sell within less than twelve months from the day on which the writ against the lands is delivered to him."

2. No sale shall be had under any execution against lands until after a return of *nulla bona*, in whole or in part, with respect to an execution against goods in the same suit or matter by the same Sheriff.

3. No Sheriff shall make any return of *nulla bona*, either in whole or part, to any writ against goods until the whole of the goods of the execution debtor in his county have been exhausted.

4. If the amount authorized to be made and levied under the writ against goods be made and levied thereunder, the person issuing the

writ against lands shall not be entitled to the expenses thereof, or of any seizure or advertisement thereunder; and the return to be made by the Sheriff to the writ against lands shall be to the effect that the amount has been so made and levied, as aforesaid.

5. The said writs against lands and goods shall have the same operation and binding effect as heretofore, and the law applicable heretofore on executions shall continue applicable, except so far as variance is requisite, by reason of the enactment hereof.

AN ACT

To Amend the Act, chapter 35 of the Consolidated Statutes of Upper Canada, entitled An Act respecting Attorneys-at-Law.

[Assented to March 4, 1868.

Whereas it is expedient to amend the Act chaptered thirty-five of the Consolidated Statutes of Upper Canada, by making provision for additional examinations in certain cases of persons desiring to be admitted as Attorneys and Solicitors; Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

1. Notwithstanding anything in the said Act contained, no persons being of either of the classes of persons mentioned in sub-sections one and two of section two of the said Act shall be admitted or enrolled as an Attorney or Solicitor, unless he has at some time during the year next but two before the time of his final examination, and at some time not less than one year thereafter and during the year next but one before the time of his final examination, passed examinations to the satisfaction of the Law Society.

2. The examinations by this Act required shall be held under the direction of the Benchers of the Law Society, and the said Benchers and Society shall in respect thereof have the same powers, and, so far as may be, follow the same directions as are by the said Act given to them respectively in reference to the examinations by the said Act required.

3. The first of the two examinations by this Act required shall not be requisite in the case of any person, now under articles whose term of service is, at the date of the passing of this Act, within four years of its expiration.

4. The second of the two examinations by this Act required, shall not be requisite in the case of any person whose term of service is at the date of the passing of this Act within two years and six months of its expiration.

5. The preceding sections of this Act shall not apply to any person whose term of service is at the date of the passing of this Act expired.

6. In case any person is prevented by illness or other unadvoidable cause, from presenting himself for, or fails to pass either of the examinations by this Act required, within the time specified, the said Benchers may, in their discretion, permit such person to pass such examination at other times; Provided that not less than nine months shall elapse between the first and second of such examinations, and not less than nine months shall elapse between the second of such examinations and the final examination.

7. The second section of the Act passed in the twenty-eighth year of Her Majesty's reign, chaptered twenty-one, and intituled "An Act to amend the Act respecting Attorneys," is hereby amended by adding thereto the words, "or who, on the the eighteenth day of March, one thousand eight hundred and sixty-five, were entered on the books of the Law Society of Upper Canada as Students-at-Law."

8. The seventh section of the said recited Act is hereby amended by adding thereto the words, "and although the applicant for admission was not, at the time of such service, actually bound by contract in writing, by reason of unintentional omission, and which contract was subsequently executed; Provided, nevertheless, that such service was *bona fide* for three or five years, as the case may be, and commenced on or before the first day of July, one thousand eight hundred and fifty-eight"

9. This Act may be cited for all purposes as "The Attorneys Act, 1868."

AN ACT

To remove doubts as to the authority of certain Commissioners to take affidavits and Bail.

[Assented to February 28, 1868.]

Whereas, it is expedient to remove doubts, respecting the authority of Commissioners appointed under the provisions of chapter thirty-nine of the Consolidated Statutes of Upper Canada, section one, for a union of Counties within this province, to continue to act as such Commissioners and to take and receive affidavits, affirmations and bail, in and for the Junior County, after its separation from such Union of Counties; Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

1. All Commissioners appointed under the said Act, for any Union of Counties, and resident within the Junior County or any city set apart from a county for judicial purposes, at the time of the separation thereof from such union, have had since such separation, and still have and may exercise the same powers within such Junior County or city to take and receive affidavits, affirmations and bail, as if they had received their commissions or appointments, respectively for such Junior County at the time of the separation of such Union of Counties, anything in any law or statute to the contrary notwithstanding.

2. No such Commissioner shall after the passing of this Act have or exercise any such powers by virtue of such commission save in such Junior County.

AN ACT

Respecting Voluntary Conveyances.

[Assented to February 28, 1868.]

Whereas it is expedient to amend the Law respecting Voluntary Conveyances: Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of Ontario, enacts as follows:

1. Notwithstanding the provisions of the statute passed in the twenty-seventh year of the reign of her late Majesty Queen Elizabeth, and chaptered four, no conveyance, grant, charge, lease, estate, encumbrance, limitation, of use or uses which is executed in good faith, and duly registered in the proper Registry Office before the execution of the conveyance to, and before the creation of any binding contract for the conveyance to any subsequent purchaser from the same grantor of the same lands, tenements or hereditaments or any part or parcel thereof, or any rent, profit or commodity in or out of the same, shall be or be deemed or taken to be merely by reason of the absence of a valuable consideration void, frustrate, or of none effect as against such purchaser, or his heirs, executors, administrators or assigns, or any person claiming by, from, or under any of them.

2. Nothing in this Act contained shall have the effect of making valid any instrument which is for any reason other than or in addition to the absence of a valuable consideration void under the said Statute or otherwise; nor shall anything in this Act contained have the effect of making valid any instrument as against any purchaser who has, before the passing of this Act, entered into a binding contract for or received his conveyance upon such purchase.

3. This Act may be cited for all purposes as "The Voluntary Title Conveyances Act (1868)."

AN ACT

Respecting Proceedings in Judge's Chambers at Common Law.

[Assented to March 4, 1868.]

Whereas, it is expedient to make provision for proceedings in Judge's Chambers in the Superior Courts of Common Law: Therefore, Her Majesty, &c., enacts as follows:—

1. Any person acting as Judge of Assize and Nisi Prius in the City of Toronto, whether for the business of the County of York or for the City of Toronto, shall, while so sitting or acting as such Judge, or while the sittings shall last, be enabled to act as a Judge in Chambers in all matters as if he were a Judge of one of the Superior Courts of Common Law.

2. Any person acting as a Judge of Assize and Nisi Prius, shall, in and for the County for which he is acting, and while the sittings of the said Court shall last, be enabled to act as a Judge in Chambers in all matters entered for trial before him, as if he were a Judge of one of the said Superior Courts.

3. In case at any time the two Chief Justices of the said Superior Courts, or in the absence of one of them, the other Chief Justice and one of the Puisne Judges of either of the said Courts, or in the absence of both Chief Justices, then in case two Puisne Judges of the said Courts shall consider it convenient for the dispatch of Chamber business, to appoint a person for any particular time to act as Judge in the transaction of Chamber business, they may, by writing under their hands, appoint either of the Clerks of the Crown and Pleas of the said Superior Courts, or a Barrister of at least five years' standing, to act as Judge for the time to be named in such writing, but such time shall not, on any occasion, exceed the period of one week, and the said time may be renewed from time to time, as often as there may be occasion therfor.

4. This Act shall continue in force for one year from the passing thereof, and no longer.

AN ACT

To amend the Law relating to purchases of Reversions.

[Assented to March 4, 1868.]

Whereas it is expedient to amend the Law as administered in Courts of Equity with respect to purchases of Reversions. Therefore, Her Majesty, &c., enacts as follows:

1. In construing this Act, the word "purchase" shall mean any kind of contract, conveyance or assignment, under or by which any kind of property may be acquired.

2. In case any purchase made before the passing of this Act of any reversionary interest in Real or Personal Estate shall hereafter be sought to be opened or set aside on the ground of undervalue, the onus of proving undervalue shall lie upon the plaintiff.

3. No purchase made after the passing of this Act *bona fide*, and without fraud, of any reversionary interest in Real or Personal Estate, shall be opened or set aside on the ground of undervalue.

4. This Act may be cited for all purposes as "The purchases of Reversions Act (1868)."

AN ACT

For amending the Law of Auctions of Estates.

[Assented to March 4, 1868.]

Whereas there is a conflict between the courts of Law and Equity in respect to the validity of sales by auction where a puffer has bid, although no right of bidding on behalf of the seller was reserved, and it is expedient that an end should be put to such conflict; and, whereas, as sales by auction are now conducted, many of such sales are illegal and could not be enforced against an unwilling purchaser, and it is expedient for the safety of

both seller and purchaser that such sales should be so conducted as to be binding on both parties. Therefore, Her Majesty, &c., enacts as follows:

1. In construing this Act, "auctioneer," shall mean any person selling by public auction: "Land," shall mean any interest in any messuages, lands, tenements, or hereditaments of whatever tenure.: "Puffer," shall mean a person appointed to bid on the part of the seller.

2. Unless in the particulars or conditions of sale by auction of any land, it is stated that such land will be sold subject to a reserved price, or to a right of the seller to bid, the sale shall be deemed and taken to be without reserve.

3. Upon any sale of land by auction, without reserve, it shall not be lawful for the seller or for a puffer to bid at such sale, or for the auctioneer to take, knowingly, any bidding from the seller or from a puffer.

4. Upon any sale of land by auction, subject to a right for the seller to bid, it shall be lawful for the seller, or any one puffer to bid at such auction, in such manner as the seller may think proper.

5. Nothing in this Act contained shall be taken to authorise any seller to become the purchaser at the sale.

6. This Act shall not apply to any sale which has taken place before its passage.

7. This Act may be cited for all purposes as "The Auctions of Estates Act (1868)."

JUDGMENTS.

COMMON PLEAS.

Present:—Richards, C. J.; Adam Wilson, J.

Saturday, March 7, 1868.

Corporation of Burleigh v. *Campbell.*—Rule absolute for new trial without costs.

Thompson v. *Leach.*—Judgment for defendant on demurrer, with leave to amend. Rule absolute for new trial on special terms.

Nettle v. *Burke.*—Rule for new trial without costs.

Smith v. *Wallbridge.* — Rule discharged with costs.

Weatherley v. *Hosker.* — Rule of defendant Toms discharged, and rule of defendant Moore to be re-argued.

Anglin v. *Minnis.*—Appeal allowed and judgment to be given in court below for defendant on demurrer to second avowry, and for defendant on demurrer to plea to said avowry.

Cole v. *Buckle.*—Rule discharged.

Strong v. *Skillbeck.* — Rule absolute for new trial, costs to abide the event.

Todd v. *London and Liverpool Ins. Co.*—Rule discharged.

Doyle v. *Eccles.*—Rule to stay proceedings on payment of all costs of suit on or before 1st day of April next, and on delivery of the books to plaintiff on or before first day of next term, then damages to be reduced to 1s ; and plaintiff on entry of judgment and taxation of costs to give credit for any costs he may have received, and in event of non-payment of costs by the day specified, or non-delivery of books by day named, rule nisi to be discharged, and, on taxation of costs, credit to be given for any costs that may have been paid.

SELECTIONS.

BOOK ABOUT LAWYERS.

(Continued from page 41.)

The Chancellors were required to guard the royal seal with their utmost care, preserved in its crimson purse of state; but, in spite of all their diligence, the seals appear to have been subjected to a number of curious mischances. When James the Second was fleeing from Whitehall, in 1688, he crossed the Thames by night, in a boat rowed by a single sculler, and, when in the middle of the river, drew forth the seal and dropped it overboard; but, wonderful to say, it was not long after brought to shore in the net of a fisherman, who restored it to its proper keepers. When Thurlow was Chancellor, the seal was stolen from his dwelling-house, by a burglar who had forced his way in, and was never recovered. A similar attempt was made to steal the Clavis Regni from Lord Chancellor Nottingham: but it happened that the faithful man was sleeping with the precious trust hidden under his pillow; so that the thief, one Thomas Saddler, failed to find it, and only carried away the mace, for which offence he was afterwards tried and hanged. Lord Eldon's country house once caught fire, and, upon the first alarm, the Chancellor, running out of doors with the seal, which he too kept in his bed chamber, buried it in the flower bed. The conflagration increased, and even Lady Eldon's maid-servants helped to supply the water. "It was," wrote Lord Eldon, "really a pretty sight; for all the maids turned out of their beds, and they formed a line from the water to the fire-engine, handing the buckets; they looked very pretty, all in their shifts." Perhaps this sight turned the old gentleman's head; for, when the fire was out and the sun rose, he had forgotten where he had buried the seal, and had to form his whole household into a digging party, who searched some time before they discovered the buried treasure. In ancient days, the discarded seals were always broken to pieces, and until recent times, with great completeness. When Charles the First's seal was surrendered to Fairfax, in 1646, it was, by order of Parliament, brought to the Bar of the House of Peers, and there broken to pieces by a smith, amidst loud acclamations. In turn, on the Restoration, in 1660, the Commonwealth's seal met a like

fate. For several generations, the custom of breaking discarded seals has been discussed; but the ceremony of *damasking*, as it is termed, is still observed. The sovereign, when he desires formally to set aside an old seal, taps it gently with a hammer, at the same time ordering his loyal subjects to regard it as smashed and ground to powder. The chancellor in office at the time regards the seal so "damasked" as his special perquisite; and a curious controversy on this subject arose between Lord Lyndhurst and Brougham, with regard to their respective claims to George IV.'s great seal. On William IV.'s accession, when an Order in Council for a new seal was made, Lord Lyndhurst was Chancellor; but before this was complete, and while George IV.'s seal was in use, Henry Brougham became keeper of the king's conscience. When at last the old seal was "damasked," the question arose to whom it fell as a perquisite of office. Lord Lyndhurst claimed, that, as the order was made during his tenure of office, the seal was actually discarded during his chancellorship, and therefore it fell to him. On the other hand, Lord Brougham argued, that the order for a new seal was but a step prudently taken in anticipation of the act by which George IV.'s seal was destroyed; that whilst the order was being executed by the engraver, the seal of George IV. was in fact as well as theory the seal of William IV.; that he (Lord Brougham) had held this seal, and had done business with it, no one venturing to hint that its virtue was impaired, or in any way affected, by the Order in Council; that the seal was not destroyed until Wm. IV. damasked it, at which time he was the holder. This dispute was warmly carried on, until William IV., acting as arbitrator by the consent of the parties, terminated the contest by a decision, which, like most decisions arrived at by arbitration, was directly in defiance of principle and precedent, but probably the only one which would have suited both contestants. The seal is made in two parts—the obverse and reverse—being, indeed, separate and distinct seals. The king, therefore, causing each part, at his own expense, to be set in a rich silver salver, gave judgment for both parties, who doubtless both "acknowledged satisfaction."

The gentlemen of the bar who donned the blue in the late rebellion, will find many a precedent for their conduct in Mr. Jeaffreson's book. "As to the sarcasms on lawyers for not fighting," said Bulstrode Whitelock (afterwards Lord Keeper) in the House of Commons, "I deem that the gown does neither abate a man's courage or his wisdom, nor render him less capable of using a sword when the laws are silent. Witness the great services performed by Leutenant-General Jones and Commissary Ireton, and many other lawyers, who, putting off their gowns when the Parliament required it, have served stoutly and successfully as soldiers, and have undergone almost as much and as great hardships and dangers as the honorable gentlemen who so much undervalue them." This same Bulstrode Whitelock was captain in Hampden's regiment of horse. On the side of the king fought Herbert, afterwards Lord Keeper to Charles II. in exile, and Hyde, afrerwards Lord Clarendon. About the same time, Lord Keeper Littleton also drilled a corps of volunteers. John Somers, attorney-at-law, father of Lord Chancellor Somers, raised a troop of horse, at the head of which he rode as captain in Cromwell's army. During the civil war, a royalist rector, in the parish church near which his troop was quartered, preached violent sermons on Divine Right and Non-Resistance, and called down Heaven's vengeance upon the rebels. Somers sent the rector a polite message, requesting him to preach more moderately; but this only served to increase his wrath. One Sunday, therefore, when the enemy was in full action, the captain took aim and sent a bullet through the sounding-board over the parson's head, and subsequently explained, that each repetition of denunciation would produce a similar interruption; and, further, that on each successive occasion, for pistol practice, the ball would strike a little lower. This "military despotism" soon put a stop to political sermons.

Chief Justice Hale, in his hot youth, burned with military ardor, and sought to fight under the Prince of Orange in the Low Countries. Though he was persuaded not to go, he sang to his expostulating brothers of the law—

> "Tell not us of issue male
> Of simple fee, and special tale,
> Of feoffments, judgments, bills of sale,
> And leases!
>
> Can you discourse of hand-grenadoes,
> Of sally ports and ambuscadoes,
> Of counterscraps and palisadoes
> And trenches?"

In the next century, Erskine commanded a voluntcer company of lawyers of Temple Bar, christened by Sheridan with the sobriquet of "The Devil's Own." The rival corps was composed of Lincoln's Inn men, and nicknamed by the populace "The Devil's Invincibles." Although Erskine had been a lieut. in the army, and used to eat his obligatory law dinners in his scarlet regimentals, he seems to have forgotten the Casey of the period; for Lord Campbell says, "I did once, and only once, see him putting his men through their manœuvres, on a summer's evening in the Temple Gardens; and I well recollect, that he gave the word of command from a paper which he held before him, and in which I conjectured that his 'instructions' were written out, as in a brief." Eldon and Ellenborough were in the rival corps—"The Devil's Invincibles,"—but both, unhappily, in the awkward squad. Lord Eldon used to say, "I think Ellenborough was more awkward than I was; but others thought it was difficult to determine which of us was the worst." This corps had attorneys in its ranks, and it was said of it,

when Lieutenant-Colonel Cox, the Master in Chancery, who commanded it, gave the word "Charge," two-thirds of its rank and file took out their note-boaks and wrote down 6*s.* 8*d.* As a counterpart of this story should be told one, which Mr. Jeaffreson has not inserted, of the volunteer company of lawyers, which was raised a few years since, during the apprehension of the French invasion. It is said, that, when the drill-master gave the order "About-face," not a man of these logical patriots stirred, but that they all stood still, and cried "Why?" Certainly, these learned gentlemen cannot be said to have felt with the six hundred—

> "Theirs not to make reply,
> Theirs not to reason why,
> Theirs but to do and die."

Naturally no English book of the present day, giving any account of social life, would be complete without some reference to that noble animal, the horse. So the author has introduced some five chapters about lawyers on horse back. He dwells with fond regret on the early days, when the law was forced to have more dependence on the saddle, and less on the express train; and notices, with evident admiration, the hunting lawyers of the present day, and one in particular whose name he does not give, and whom our acquaintance with the English bar gives us no means of knowing, whose "pale, handsome face, many readers have doubtless seen through the open window of the raildroad carriage, as, clothed in pink, he has been carried past them to the happy hunting grounds." He extols, too, with vivid admiration and fine writing, how "crimson-gold, burnished steel, and floating ancient, gladdened the eye," and of the "blare of trumpets, rattle of armor, tramp of iron, neighing of horses, and joyous hum of riders," in the circuit under the Plantagenets. Without any hope for a revival of the floating ancient or blare of taumpets, the wish may well be expressed, that our profession in America were obliged to have more familiarity with horses than essays on warranty suffice to give. It is a notorious fact, that the health of a large number of our leading advocates is broken down by overwork, and by a neglect out-of-door exercise, of which that in the saddle is the best; while, in England, the large number of their most distinguished lawyers, who have without doubt done an equal amount of work, and have far exceded threescore years and ten, is a striking proof, that the English habits in this regard are far better than our own. If, then, it is not permitted to the hard-worked advocate among us to be clothed in pink and ride after hounds, at least a good horse, a good road, and a bracing air, are always open to him.

In the seventeenth century, it would seem that some knowledge of horsemanship was necessary to all lawyers. Samuel Pepys enters in his diary, on Oct. 23, 1860: "I met the Lord Chancellor and all the judges riding on horseback, and going to Westminster Hall, it being the first day of the term." He also records how Sergeant Glynne, an eminent lawyer, came to grief at the coronation of Charles II., "whose horse fell upon him yesterday, and is like to kill him." Later than this, the barristers rode their circuits in the saddle, while the judges were carried in their private carriages. Lord Kenyon, when a young man, appeared on a small Welsh pony from his native hills, Erskine, too, rode a pony; and Thurlow's ingenious method of hiring a horse without paying for him, has already been related. In those days, there was peril not only from highwaymen, but from flood and field. An amusing story is told of Eldon, travelling the Northern Circuit, which is thoroughly Scotch in its literal humor. The lawyer was about to cross some dangerous sands, contrary to the advice of his landlord. "Danger, danger," he exclaimed, impatiently; "have you ever *lost* anybody there?"—"Nae, sir," answered mine host, slowly, "naebody has been *lost* on the sands: the puir bodies have 'a been found at low water." In spite of such dangers, all historians of lawyers in England of former days are wont to extol the pleasures of the circuit, with its feasting and balls and circuit mess—when Scott was Attorney-General of the Circuit Grand Court, and used to prosecute offenders "against the peace of our lord, the junior;" when Campbell opened the court, with a fire-shovel in his hand as an emblem of office; and when an eminent lawyer was duly indicted and fined a dozen of wine, for the heinous crime of being "the best special pleader" in England. Pepper Arden (afteawards Lord Alvanley) was indicted for having said that "no man would be such a——fool as to go to a lawyer for advice, who knew how to get on without it." The archives of the court record:—

> "In this he was considered as doubly culpable: in the first place, as having offended against the laws of Almighty God, by his profane cursing, for which, however, he made a very sufficient atonement by paying of a bottle claret; and, secondly, as having made use of an expression, which, if it should become a prevailing opinion, might have the most alarming consequences to the profession, and was therefore deservedly considered in a far more hideous light. For the last offence he was fined three bottles. Pd."

While the barristers were thus in the saddle on the circuit, they had doubtless left their wives in those dusty, dirty inns of courts which are now never graced by women's presence; unless, indeed, when a visit is made by a pretty girl, such as Thackeray records, with—

> "A smile on her face, and a rose in her hair,
> And she sat there and bloomed in my cane bottomed chair."

But, in those days, young couples began housekeeping in chambers where they had six rooms at their disposal, including "a trim compact little kitchen."—"Frequently," says Mr. Jeaffreson, "the lawyer over his papers

was disturbed by the uproar of his heir in the adjoining room." The admirer of Dickens will recall Tommy Traddles, with his "dearest girl in the world;" and her five sisters and "the beauty," playing in his chambers. We take down our volume of Copperfield, and find that Mr. Traddles remarks, "Even Sophy's being here is unprofessional,"—a saying which may possibly be valuable to the student of legal manners some centuries hence.

Of another sort was Sarah, Duchess of Marlborough, who came to take advice of Mansfield when a young man. The lawyer was supping out, and his clerk told him, "I could not make out who she was, for she would not tell her name; but she swore so dreadfully, that I am sure she must be a lady of quality."

The subject of fees cannot but be an agreeable one to any lover of his profession, however disinterested. The author needs no excuse for all he can say upon it. Going back as far as the reign of Richard II., it is found, that lawyers were so unprofessional as to go to their clients' houses and give them advice. William de Beauceamp, claiming the earldom of Pembroke, "invited," says Dugdale, "his learned counsel to his house in Paternoster Row; amongst whom were Robert Charlton (then a judge), William Pinchbek, William Branchesly, and John Catesby (all learned lawyers); and, after dinner, coming out of his chapel in an angry mood, threw to each of them a piece of gold, and said, 'Sirs, I desire you forthwith to tell me whether I have any right or title to Hastings' lordship and lands.' Whereupon Pinchbeck stood up (the rest being silent, fearing that he suspected them) and said, 'No man here nor in England dare say that you have any right in them except Hastings do quit his claim therein; and should he do it, being now under age, it would be of no validitie.'" The scene is full of character; the counsel waiting; the Norman baron coming out after dinner, and flinging them each their fee, as to a dog; the haughtiness of his language, "I desire you forthwith to tell me;" and, spite of all this, the manly independence of the lawyer's opinion. At this time, and for many years later, it was customary for clients to provide food and drink for their counsel. Mr. Foss gives the following list of items, taken from a bill of costs made in the reign of Edward IV.:—

	s.	d.
For a breakfast at Westminster, spent on our counsel	1	6
To another time for boat hire in and out, and a breakfast for two days	1	6

In like manner, the accountant of St. Margaret's Westminster, entered in the parish books, "Also, paid to Robert Fylpott, learned in the law, for his counsel given, 8*s.* 8*d.*, with 4*d.* for his dinner." Here are some items in an old record of disbursements made by the corporation of Lyme Regis:—

	£	s.	d.
Paid for wine carried with us to Mr. Poulett	0	3	6
Wine and sugar given to Mr. Poulett..	0	3	4
Horse hire, and for the sergeant to ride to Mr. Walrond, of Bovey, and for a loaf of sugar, and for conserves given there to Mr. Poppel	1	1	0
Wine and sugar given to Judge Anderson	0	3	4
A bottle and sugar given to Mr. Gibbs.	3	3	0

The value of money in the sixteenth century is so different from the present, that it is difficult to make comparison of the fees of that period with the present. Sir Thomas Moore, in the reign of Henry VIII., "gained, without grief, not so little as £400 by the year." Lord Campbell regards this as "an income which, considering the relative profits of the bar, and the value of money, probably indicated as a high station as £10,000 a year at the present day. This is but relative, however, and compares but poorly with Francis Bacon's income, which, when he was Attorney-General, not very many years after, amounted to £6,000, and was a royal income for those days. Cope made a still larger income during his tenure of office, the fees and official practice amounting to no less a sum than £7,000 a year.* These were very extraordinary income; for, in the reign of Charles II., Somers was thought a fortunate and rising man, and made £700. Pepys, as usual, gives some valuable information. Being about to go before the House of Commons to argue an Admiralty cause, he records, "To comfort myself, did go to the 'Dog' and drink half a pint of mulled sack, and in the hall did drink a dram of brandy at Mrs Hewlett's; and with the warmth of this did find myself in better order as to courage, truly." He acquitted himself so well with this Dutch courage, that "a

* "The salary of the Attorney-General," says Lord Campbell, in a note to the "Chief Justices," "was £81 6*s.* 8*d.*; but his official emoluments amounted to £7,000 a year. His private practice, too, must have been very profitable." It is extremely difficult to say to what sum of our present money this is equivalent. Coke was Attorney-General from 1594 to 1606. The importation of American gold began to effect the value of silver in England in 1578, according to Adam Smith, and ceased in 1640. During this time, this value sank in relation of one to four. The value of silver remained about the same until the present century, when a further decrease of fifty per cent. up to the present day may be predicated of it. Coke's term of office occuring just in the middle of the period before mentioned, it may be fair to take the the average, and to consider it as worth double what it would have been worth in 1640, or £14,000: add an increase of fifty per cent., and it becomes £21,000 as the *actual* equivalent in money. But its comparative equivalent is far larger. Macaulay, writing of the period of James the Second, nearly a century later, gives the income of the richest peer in England, the Duke of Ormond, as £22,000, and the and the average income of a peer as £3,000. "A thousand a year," he says, "was thought a large revenue for a barrister. Two thousand a year was hardly to be made in the King's Bench, except by the crown lawyers. It is evident, therefore, that an official man would have been well paid if he had received a fourth or fifth part of what would now be an adequate stipend." (History of England, vol. i. ch. iii.) Further on (vol. iv.) he rates £80,000 so late as the time of William III. at "more than £300,000 in our time when compared with the value of estates." To double Coke's income, even with the fifty per cent. already added, cannot therefore be excessive, in order to arrive at its relative value. This makes it £42,000, or £210,000 in gold—equivalent to $294,000 in our currency of to-day. This was, it will be remembered, exclusive of his private practice, and yet is to be regarded as an extremely moderate estimate.

gentleman said that I could not get less than £1,000 a year, if I would put on a gown and plead at the Chancery bar." These incomes, though good, were not in the highest; for there is preserved a fee-book of Sir Francis Winnington, showing that, in 1673, he received £3,371; in 1674, £3,560; and in 1675, when he was Solicitor-General, £4,066. Roger North records of his brother Francis (afterwards Lord Keeper Guildford), that his income, when Attorney-General, was £7,000. Doubtless these enormous incomes were not gained by the chief law officers of the Stuarts, without the doing of much dirty work. The lawyers of this period were wont to keep the money paid them in their skull-caps; and Roger North says of his brother, "His skull-caps, which he wore when he had leisure to observe his constitution, as I touched before, were now destined to lie in a drawer to receive the money that came in by fees, One had gold, another the crowns and half-crowns, and another the smaller money." It appears too from "Hudibras," that this money was sometimes kept for show on the table, as calfskin and paper may be kept to-day in Court Street:—

> "To this brave man the knight repairs
> For counsel in his law affairs.
> And found him mounted in a pew,
> With books and money placed for show,
> Like nest-eggs, to make clients lay,
> And for his false opinion pay."

Pemberton's fee for defending the "Seven Bishops" shows that legitimate business at this time gave but slight rewards. His retaining fee was five guineas; he received twenty guineas with his brief, and three for a consultation.

In the eighteenth century, Charles Yorke's (afterwards Lord Hardwicke) receipts afford an excellent example of the progress of a rising lawyer. They were for the first year's practice, £121; second, £201; third and fourth, between £300 and £400 per annum; fifth, &700; sixth, £800; seventh, £1,000; ninth, £1,600; tenth, £2,500. This gradually increased, until during the last year of his tenure of his office of Attorney-General, he received £7,822. Lord Eldon used to say about himself, that he agreed with his wife, on beginning practice, that what he got the first eleven months should be his, and what in the twelfth hers; and that for the first eleven months he had made not one shilling, and in the twelfth half-a-guinea. Out of this "eighteenpence went for charity, and Bessy got nine-shillings." Whether this was so, or merely told to make a good story, it appears from his fee-book, that in 1786, ten years after he began practice, he made £1,833. 7*s.*, and that in 1796 his receipts were £12,140. 15*s.* 8*d.*

It seems, from the extract from Dugdale already given, that one of William de Beauchamp's learned counsel was a judge. From this and other sources it appears that judges were not precluded in ancient time from giving opinions to, and taking money from, private clients; though they were forbidden to take gold or silver from any person having "plea or process hanging before them." Indeed, down to the time of James I., and somewhat later, the salaries paid to judges were merely retaining fees, and their chief remuneration consisted of a large number of smaller fees. They were forbidden to accept *presents* from actual suitors; but no suitor could obtain a hearing from any one of them, until he had paid into court certain fees,—of which the fattest was a sum of money for the judge's personal use.

That the salaries of the judges in the time of Elizabeth were small, in comparison with the sums which they received in presents and fees, may be seen from the Table of Judges' Allowance, of which the following is an extracts:—

The Lord Cheefe Justice of England.

	£	s.	d
Fee, Reward, and Robes	208	6	8
Wyne, 2 tunnes at £5	10	0	0
Allowance for being justice of assize..	20	0	8

It is unnecessary to say, that this system of presents, countenanced and practised even by Queen Elizabeth, gave occasion to great corruption. In it is concerned the whole question of the bribery of Lord Bacon, on which it would be useless here to enter. The very handsome salaries, as well as retiring pensions, paid to judicial officers in England, has long since put a stop to this system, and set us an example which we should do well to copy.*

In a review of the ancient chronicles of England, it is apparent that the law university was a much more conspicuous feature of London than it has been in more modern generations, and that its members exercised a much greater influence than at present, — circumstances which render its history not only more interesting, but important. "To appreciate," says Mr. Jeaffreson, "the great influence of the law university in the fifteenth and sixteenth centuries, it must be borne in mind, that the gownsmen (judges, sergeants, ancients, readers, apprentices, and students being comprised by this term) maintained to the townsmen almost as large a proportion as the gownsmen of Oxfork or Cambridge maintain at the present time to the townsmen of those learned places." All that the "season" is to modern, the London, the "term" was to old London, from the accession of Henry VIII. to the death of George II.; and many of the existing commercial and fashionable arrangements of a London "season" may be traced to the old world "term." Besides those students who

	Annual salary.	Annual pension on retirement.
* Lord Chancellor of England	£10,000	£5,000
Lord Chief Justice of King's Bench ..	8,000	3,750
Lord Chief Justice of Common Pleas ..	7,000	3,750
Master of the Rolls	6,000	3,750
Lord Justices (each)	6,000	3,750
Vice-Chancellor of England	5,000	3,500
Chief Baron of the Exchequer.....	7,000	3,750
Each Pusine Judge or Baron	5,000	3,500

went to the Inns to study, there were a large number who merely lived there for the sake of the position aud convenience it gave them for enjoying the pleasures of the metropolis. In the fifteenth century, the students numbered two thousand. In Elizabeth's time the number fluctuated between one and two thousand. In Charles II.'s reign, there were about fifteen hundred. Many of these young men were among the gayest gallants of their periods. Under the court, they set the fashion in dress, slang, amusement, and vice. They performed plays and masques, or were critics of the plays acted upon the stage; and no actor could achieve popularity, if the students of the Temple or the Inns conspired to laugh him down. Mr. Jeaffreson relates, with much smack and gusto, the pomps and processions, the masques, amateur theatricals, the jests, the drinking-bouts, and revels, in which these young men took part under the Stuarts. We shake our pious, proper heads, in these sober days of the nineteenth eentury, at such routs; but it was an age of debauchery, and even the veterans of the bar exceeded the limits of strict propriety. Chief Justice Saunders was a hard drinker, taking nips of brandy (so says Roger North) with his breakfast, and seldom appearing in public "without a pot of ale at his nose, or near him," which was even served in court. Evelyn tells how, at Mrs. Castle's wedding, "Sir George Jeffreys, newly made Lord Chief Justice of England, with Mr. Justice Withings, danced with the bride, and were exceeding merry."—"Where," asked Lord Chief Justice Holt (if the story is true), of a criminal just sentenced to death, whom he recognized as a boon-companion in the days of his hot youth,—"Where are all our friends of the Devil's Tavern?"—Ah, my Lord!" said the man, "they are all hanged but myself and your lordship. It is to be remembered, that in those times are to be found the foulest blots on the administration of justice which our common law has ever known. Much later than this, that sound old port wine, which used to be the pride of Britain, caused other high legal functionaries to perform curious freaks. "Returning," says Nathaniel Wraxall, "by way of frolic, very late at night, on horseback, to Wimbledon from Addiscombe, the seat of Mr. Jenkinson, near Croydon, where the party dined, Lord Thurlow the Chancellor, Pitt, and Dundas found the turnpike gate, situated between Tooting and Streatham, thrown open. Being elevated above their usual prudence, and having no servant near them, they passed through the gate at a brisk pace, without stopping to pay the toll, regardless of the remonstrances and threats of the turnpike man, who, running after them, and believing them to belong to some highwaymen who had recently committed some depredations on the road, discharged the contents of his blunderbuss at their backs. Happily, he did no injury." Lord Eldon was a great lover of port wine. He and his brother William, afterwards Lord Stowell, used to dine together, on the first day of each term, in a tavern near the Temple. Mr. Jeaffreson tells a story, in amusing way, of Lord Stowell's recalling, when an old man, these terminal dinners to his son-in-law, Lord Sidmouth. The latter observed, "You drank some wine together, I dare say?" Lord Stowell, modestly: Yes, we drank some wine." Son-in-law, inquisitively: "Two bottles?" Lord Stowell, quickly putting away the imputation of such abstemiousness, "More than that." Son-in-law, smiling, "What! three bottles?" Lord Stowell, "More." Son-in-law, opening his eyes with atonishment, "By Jove, sir, you don't mean to say that you took four bottles?" Lord Stowell, beginning to feel ashamed of himself, "More; I mean to say we had more. Now don't ask any more questions."

The following amusing tale of virtuous indignation, may in this connection be repeated. Alex. Wedderburn's (Lord Loughborough) forte was never virtue. Though not a noted gambler, he was a constant frequenter of Brooke's and White's, and was well known to the world to be versed in all the mysteries of gambling and dicing. Sitting one day at *nisi prius*, he exclaimed with great warmth, "Do not swear the jury in this cause, but let it be struck out of the paper. I will not try it. The adminstration of justice is insulted by the proposal that I should try it. To my astonishment, I find that the action is brought on a wager as to the mode of playing an illegal, disreputable, and mischievous game called 'hazard,'—whether, allowing seven to be the main and eleven to be the nick to seven, there are more ways than six of nicking seven on the dice? Courts of justice are constituted to try rights and to redress injuries, not to solve the problems of gamesters. The gentlemen of the jury and I may have *heard* of 'hazard' as a mode of dicing by which sharpers win, and young men of family and fortune are ruined; but what do any of us know of 'seven being the main,' or 'eleven the nick of seven'? Do we come here to be instructed in this lore? and are the unusual crowds (drawn hither I suppose, by the novelty of the unexpected entertainment) to take a lesson with us in these unholy mysteries, which they are to practice in the evening in the low gaming houses in St. James Street,—pithily called by a name which should inspire a salutary terror of entering them? Again, I say, let the cause be struck out of the paper. Move the court, if you please, that it may be restored; and, if my brethren think I do wrong in the course I now take, I hope that one of them will officiate for me here, and save me from the degradation of trying 'whether there be more than six ways of nicking seven on the dice, allowing seven to be the main and eleven to be a nick to seven.'—*a question, after all, admitting of no doubt, and capable of mathematical demonstration.*" *

*See *Brown* v. *Leeson*, 2 H. Bl. 43, when the same degree of virtue is shown *in banco*.

Speaking of cards, the eminent puisne judge, Mr Justice Buller, although he did not entertain progressive ideas on the law of libel, and gave evidence of former good character a curious turn against prisoners,† was certainly right in his view of whist,—that best of all games for a lawyer; for he used to say, that his idea of heaven was to sit at *nisi prius* all day, and play whist all night. Had he been living, he would have appreciated an excellent repartee of Lord Chelmsford's. As Frederick Thesiger, he was engaged in the conduct of a cause, and objected to the irregularity of the opposing counsel, who, in examining his witnesses, repeatedly put leading questions. "I have a right," maintained the counsel, doggedly, "to deal with my witnesses as I please."—"To that I do not object," retorted Sir Frederick. You may *deal* as you like; but you shan't *lead*."

The subject of the non-professional culture possessed by lawyers presents an interesting study. In olden times, a large proportion of the best students from universities entered what was then pre-eminently the profession of letters,—the Church. During the last fifty years, however, the bar has so far invaded on the province of the clergy, as to occasion no little alarm to the ecclesiastics. "The number of men," says Mr. Jeaffreson, "now upon the books of Lincoln's Inn, who have won the 'high honors' of Oxford and Cambridge, is a suggestive fact." A list, compiled from the last volume of Foss' "Judges of England," is given, containing eighty-two names of the most distinguished judges of the last three reigns. some of whom are still living. Of these, it is stated that thirty-two received no education at Oxford, Cambridge, Edinburgh or Dublin; one was educated at Edinburgh, four belong to Dublin, eleven were trained at Oxford; and thirty-four came from Cambridge, twenty-three of these being from a single college,—that of Trinty, Cambridge, which can fairly boast of being, above all others, the nursery of English lawyers. Of the lawyers thus educated, among those who have taken very high honors, may be mentioned Lord Tenterden, of Copus Christi College, Oxford, winner of the only two honors then open to competition,—the Chancellor's medals for Latin and English composition; Lord Landale, of Caius College, Cambridge, senior wrangler and senior Smith's prizeman; Sir J. Taylor Coleridge, Corpus Christi College, Oxford, first classman, winner of three Chancellor's prizes; Lord Lyndhurst, Fellow of Trinity College, Cambridge, second wrangler, Smith's prizeman; and Sir Edward Hall Alderson, Caius College, Cambridge, senior wrangler, Smith's prizeman, senior medalist. It was the latter whose classical ears were shocked, when Baron of the Exchequer, by the application of counsel for a *nolle prosē qui*. "Stop sir," he said, "consider that this is the last day of the term, and don't make things unnessarily long." A fellow story to this, not told by Mr. Jeaffreson, of Sir J. L. Knight Bruce, late one of the Lord Justices of Appeal, properly finds its place here. A barrister, lately called, who had been a double first-class man at his university, was making a long and tedious argument before him, and quoted with unction and emphasis the maxim "Expressio unius est exclusio alterius," giving the *i* in *unius* short. The Lord Justice, arousing himself from a sort of half-slumber, said, "*Ūnius*, Mr.———; *ūnius*. We always pronounced it *ūnius* at school."—"Oh yes, my lord!" replied Mr. ———; "but some of the poets make it short, for the sake of the metre."—"You forget, Mr. ———," said the judge, "we are *prosing* here." In an anecdote told of Lord Campbell, the advantage was on the side of the counsel. In an action brought to recover for damages done to a carriage, one of the counsel repeatedly called the vehicle in question a "broug-ham," pronouncing both syllables of the word *brougham*. Whereupon Lord Campbell with considerable pomposity, observed, "*Broom* is the more usual pronunciation: a carriage of the kind you mean is generally, and not incorrectly called a 'broom.' That pronunciation is open to no grave objection, and it has the great advantage of saving the time consumed by uttering an extra syllable." Half an hour later, in the same trial, Lord Campbell, alluding to a decision given in a similar action, said, "In that case, the carriage which had sustained injury was an *omnibus*———"—"Pardon me, my lord," interposed the counsel with such promptitude that his lordship was startled into silence; "a carriage of the kind to which you draw attention is usually termed a *buss*. That pronounciation is open to no grave objection, and it has the great advantage of saving the time consumed by uttering *two* extra syllables." The interruption was naturally followed by a roar of laughter, in which Lord Campbell joined more heartily than any one else.

In adverting to an anecdote of this useful vehicle with the Roman name (the plural of which is still in dispute among scholars), the topic of the classics has not been quitted, and, as an offset to the nice ear of these judges, the Latinity of Lord Kenyon may be noticed. "Modus in rebus," his Lordship would remark, if a trial was too long: "there must be an end of things." When a case of glaring fraud was brought before him, he exclaimed, "The dishonesty is manifest; in the words of an old Latin sage, apparently 'Latet anguis in herba.'" Again he said, with a face of great wisdom, "In *advancing* to a conclusion on this subject, I am resolved *stare supra antiquas vias*." He is even said to have informed a jury, that, in laying their heads on their pillows with a consciousness of duty performed,

† Buller was a very severe man. One of his sterner dicta was, that previous good character was a reason for increasing rather than for lessening a culprit's punishment. "For," he argued, "the longer the prisoner has enjoyed the good opinion of the world the less are his excuses for his misdeed, and the more injurious his conduct to public morality."

they might apply to themselves the words of the heathen philosopher, "Aut Cæsar aut nullus." But this is too bad. Coleridge, in his "Table Talk," is, however authority for the story, that, in a trial for blasphemy, he said to the jury, "Above all, gentlemen, need I name to you the Emperor Julian, who was so celebrated for the practice of every Christian virtue, that he was called *Julian the Apostle.*" His knowledge of the poets was certainly peculiar. "The allegation," he once exclaimed indignantly during the examination of an unsatisfactory witness, "is as far from truth as old Booterium from the Northern Main,—a line I have heard or met with, God knows *where;*" and there is something unspeakably funny in the metaphor addressed by him to a prisoner convicted of stealing a large quantity of wine belonging to his employer, that "he had feathered his nest with his masters bottles," and in the magnificent pathos of this touching peroration: "Prisoner at the bar, a bountiful Creator endowed you with a powerful frame, a comely appearance, and more than ordinary intelligence; and, through the care of your respectable parents, you received at the outset of life an excellent education: *instead of which you have persisted in going about the country and stealing ducks.*"—*American Law Review.*

COUNTY COURT JUDGES.

"A Templar" thus writes to a contemporary: "It has been suggested in a letter from 'A Working Solicitor,' that puisne judges should by a statutable provision be appointed from the County Court judges of so many years' standing. Of course, so long as County Court judges remain as they are, this would be impossible, but the object being to improve the character of County Court judges, and to induce a higher order of men to accept such posts, it may be thought that this provision would do much good, and comparatively little harm. 'The chief objection,' says your correspondent, 'seems to be a diminution of patronage to the ministry of the day,' and that, to lawyers, is the reverse of an objection. I think, however, there are other reasons against any such limitation of the choice of puisne judges. Whatever may be the tendency of the new Act to raise the character of County Court business, the limits fixed by the several sections will exclude the heaviest cases. Thus one of the most valuable elements of legal practice will be taken away from the man who accepts a County Court judgeship. The highest legal authorities of his own standing will no longer set their minds to his, and no longer sharpen up his intellect by their antagonism. He will be compelled to hear a multitude of very small details, and to decide between two sharp local attorneys, or between an attorney and a defendant in person. Up to a certain point this is very good practice, but it does not enable a man to grapple with the real difficulties of heavy business, as it is known at the Guildhall or at Liverpool. An advocate who has been forced to comprehend a difficult case in order to bring it before a jury, has so much the more chance of mastering the same problems when he sits on the bench. We should no doubt secure better judges by raising the present scale of salaries, but without some chance of promotion this would not be enough: with a certainty of promotion it would, I fear, defeat its own object. If it were possible to unite the County Court system with that of quarter sessions, and to give the present recorders of boroughs a civil jurisdiction which would give them an insight into the general work of a judge, while it left them time for the business of an advocate, I think many of the present objections to the County Courts would be overcome, and the whole course of business might be elevated."—*Law Times.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*

In re Miron v. McCabe.

Division Courts—Jurisdiction—Reduction of claim by payment or set-off—Prohibition—Stay of proceedings.

Held, 1. That a balance of an account which originally exceeded $200, but had been reduced by *payment* (not set-off) to under $100, was within the jurisdiction of a Division Court.

2. Affidavits, to be used on an application for a prohibition, should be entitled in the court to which application is to be made, but should not be entitled in any cause.

3. There is no authority in this country for a judge to stay proceedings in court below pending prohibition.

[Chambers, Dec. 14, 1867.]

A summons was granted in this matter by Mr. Justice Morrison, on the 29th November last, calling upon Miron, the plaintiff in a suit in the Ninth Division Court of the County of Hastings, against McCabe, defendant, and upon the judge of the said court, to show cause why a writ of prohibition should not issue to the said judge to prohibit him from further proceeding in the said Division Court on the said plaint, and from enforcing the judgment therein, on the ground that the said court and judge had no jurisdiction of the said plaint; and that the plaintiff's claim is not within the jurisdiction of the Division Court, and so appears from the particulars thereof, being for a balance due upon an unsettled account exceeding the sum of $200; and why the said Miron should not pay the costs of the application; and in the meantime that all further proceedings in the said court be stayed.

It appeared that the summons in the court below was issued on the 23rd October last, stating the plaintiff's claim at $67 47½.

The particulars of claim attached to the summons claimed a *balance* of account, as follows:

Terence McCabe, Esq.,

1867. To Joseph Miron, the younger, Dr.

May. To 6 months 23½ days service, at the rate of $34 per month.....$234 55

Cash paid men... ..... 2 00

$236 55

Cr. By..... 169 07½

Balance due..... $67 47½

The affidavit filed by the defendant stated that this was a balance claimed on an unsettled account, as appeared by the particulars of claim; that when the case came on for trial, on the 4th November, he appeared in person to defend the same, and objected that the court had not jurisdiction in the matter, as the unsettled account exceeded in amount two hundred dollars; that the judge overruled the objection, heard the cause, and gave judgment in favor of the plaintiff for $9 97c. and costs; that the plaintiff's application for a new trial is still pending; that no execution has issued on the judgment, and the defendant has not paid the amount of the judgment; that he does not owe the plaintiff anything; and that the sum of $169 07½c. credited by the plaintiff on his claim, is part of a set-off which the defendant has against the plaintiff's claim; and that no agreement or settlement had taken place between them in reference to the said claim or set-off, or any part thereof.

The plaintiff, in his affidavit, stated that the defendant paid him on account of his wages, and in liquidation of the account, at different times, in all, the sum of $155 15c. in cash: that the sum of $42 was paid by the defendant to one Gordon, on the plaintiff's written order, as he believes; that the extent of contra account of the defendant against the plaintiff was, as he believes, no more than $13 92c.: that his claim was for a balance of wages for the sum of $67 47½c., and it would only have been for $25 47½c. if he had known of the order in favor of Gordon, for $42 had been paid: that the defendant, at the trial, fully entered into his defence; and that the sum awarded to the plaintiff by the judge is justly due to him.

It was sworn on behalf of the plaintiff that an execution had been issued on the judgment, on which the deponent believed certain cattle of the defendant's had been seized.

Spencer showed cause.—*Siddall* v. *Gibson*, 17 U. C. Q. B. 98, shews that it was an irregularity to entitle the affidavits used on this application in any court as these affidavits were entitled*. On the merits he referred to *McMurtry* v. *Munro*, 14 U. C. Q. B. 166; *Wallbridge* v. *Brown*, 18 U. C. Q. B. 158; *Turner* v. *Berry*, 5 Exch. 858.

Osler supported the application. The affidavits, it is laid down expressly in Arch. Pr. 12 Edn. 1755, in a case of prohibition, "should be entitled in the court to which, or to the judge of which, the application is to be made, but not in any cause or matter." See also 11 Edn. 1727. And on the merits he referred to *Re Denton*, 32 L. J. Exch. 89; see also 1 H. & C. 654; *Furnival* v. *Saunders*, 26 U. C. Q. B. 119; *Hodgson* v. *Graham*, 26 U. C. Q. B. 127; *Higginbotham* v. *Moore*, 8 U. C. L. J. 68.

Adam Wilson, J.—The Division Courts have jurisdiction of "all claims and demands of debt, account or breach of contract or covenant, or money demand, where the amount or balance claimed does not exceed one hundred dollars." The amount of the plaintiff's side of the account did not exceed one hundred dollars; but the question is, whether the amount or balance claimed exceeds that sum?

That depends upon the meaning to be placed upon the expression, "the amount or balance claimed." In the case of *Woodhams* v. *Newman*, 13 Jur. 456, the wording of the English County Courts Act was, that those courts should have jurisdiction of "all pleas of personal actions, where the debt or damage claimed is not more than twenty pounds, whether on balance of account or otherwise;" and there it was held that the meaning of the words "balance of account or otherwise," was where the parties themselves had balanced the account, or where it was balanced by payments made on account; but that the plaintiff was not at liberty to reduce his claim by crediting the defendant with a set-off; for he could not compel the defendant to rely on his set-off, by giving him credit for it. *McMurtry* v. *Munro*, 14 U. C. Q. B. 166, is to the same effect, and is founded upon *Woodham* v. *Newman*, cited by Mr. Justice Burns, as in 7 C. B. 654. *Turner* v. *Berry*, 5 Exch. 858, points to the same distinction between payment and set-off; and so also does *Furnival* v. *Saunders*, 26 U. C. Q. B. 119.

The distinction between the two is quite plain. A *payment* is a sum expressly applicable in reduction of the particular demand on which it is made; that demand is therefore reduced by the extent of the payment. To constitute a payment, the transaction must have the assent of both parties, and for such payment no action is maintainable; while a *set-off* is a separate and independent demand which one party has against the other, and in respect of which he is as much a creditor of the other, as that other is to him, and for which he can as well maintain a separate action, as his creditor can for his demand.

In a case of payment, the payment must be pleaded (if the plaintiff do not credit it), when the demand is sued for in respect of which the payment was made, otherwise it is entirely lost, and can never be recovered back: *Marriott* v. *Hampton*, 7 T. R. 269; 2 Smith's Leading Cases 875; while a set-off need not be pleaded, and credit for it cannot be forced upon the party against his will.

A payment was always a deduction at the common law, while it required a statute to enable a set-off to be made to an action.

I am satisfied, therefore, that if the balance claimed here be a balance resulting from *payments* made by the defendant, and not from a set-off credited to him against his will, the judge below had jurisdiction.

It is stated in Archbold's Practice, that on a question of prohibition, the court will look, not merely at the plaint and particulars, but at the actual facts; and if it appear that the claim is in substance for damage arising out of a matter excluded from the jurisdiction of the court (as malicious prosecution), a prohibition will be granted.

Referring, then, to the summons and particulars in this case, it appears the demand sued for was a debt or account, in which *the balance claimed* did not exceed one hundred dollars.

* The case referred to only decided that the "affidavit, &c., should not have been entitled in any *cause*."—Eds. L. J.

The defendant undertakes to show that although this does so appear in the summons and particulars, yet it was not for such a claim in fact, because the *balance claimed* was an arbitrary, unwarranted balance, struck by the plaintiff himself, for the mere purpose of making it appear that his claim was within the jurisdiction of the inferior court, and was not such a balance as was within the provisions of the statute.

I have already stated that a balance which is less than $100 of a claim exceeding that amount, but reduced below it by payment, is a balance within the meaning of the statute—does the defendant show that this balance was not arrived at in that way, but in some way unauthorized by the statute? The defendant calls it the balance of an *unsettled* account, as appears by the particulars, that he objected at the trial that the *unsettled* account exceeded two hundred dollars, and that the sum of $169 07½c. credited by the plaintiff on his claim is "part of a set-off which the defendant has against the plaintiffs claim, and that no agreement or settlement had taken place between them, in reference to the said claim or set-off or any part thereof." This does not plainly show that the credit was a set-off in its proper signification, as distinguished from a payment, nor does it show of what the alleged set-off consisted, so that I could have determined whether it was or was not a set-off, while the plaintiff distinctly swears the defendant "paid him on account of his wages and in liquidation of the account at different times, in all, the sum of $155 15c. in cash," and "that the defendant's *contra account* was, as he believes, no more than $18 92c." This latter sum is, I presume, a set-off, but leaving that out of consideration, there is the full claim of $236 55c. reduced by payments amounting to $155 15c., leaving a balance claimed of debt or account of, $81 40c., and so not exceeding one hundred dollars. The Division Court had therefore clearly jurisdiction in this matter.

The defendant's affidavit read in connection with the plaintiffs, is not so candid as it should have been; he represents the credit of $169 07½c. *as part* of a set-off which he has against the plaintiff, leading one to suppose that *the whole sum of* $169 07½c. is a set-off, and that it is *part* of a *larger* set-off which he has against the plaintiff, while the plaintiff shows that it is only a part of this sum which is a set-off at all, and that such set-off is only $18 92, while all the rest of it is a payment.

I am glad to be able to come to this conclusion, in a case where the whole dispute is about the trifling sum of $9 97c., and where complete justice has been done between the parties.

If however it had appeared that the jurisdiction of the Division Court had been exceeded, I should have been obliged to have interposed, however small the sum in litigation might have been, for there can be no question of greater consequence at any time brought before a Superior Court, than the maintenance of all other Courts within their legitimate jurisdiction. I think there was no just cause for disputing the jurisdiction of the Court below.

I should notice also that the affidavits on which this motion is founded are rightly intituled in the Superior Court and not in any cause or matter.

And I should also say that the summons for a prohibition should not perhaps have stayed the proceedings of the Court below.

This power has been expressly given to the judge in England, by the Imperial Statute 19 & 20 Vic. c. 108, sec. 40, which is not applicable here. I state this that this particular summons may not be taken as an admitted precedent.

I must discharge this application with costs, to be paid by McCabe to Moore.

Summons discharged with costs.

Hall v. Remily et al.

Action on bail-bond—Stay of proceedings by bail.

H. had R. arrested on mesne process on 14th November, 1867. P. and H. became his bail to the sheriff. Special bail was not put in within ten days, and on 25th November H. took assignment of sheriff's bail bond and brought an action on it. Special bail was put in and perfected upon 28th November, and notice given.

Held, that the bail were entitled to have the proceedings stayed on payment of costs.

[Chambers, December 18, 1867.]

This was an application to stay proceedings on a bail bond at the instance of the bail, for their own indemnity.

Hall caused Remily to be arrested on mesne process on the 14th day of November, 1867. After his arrest, Partridge and Heathfield became his bail to the sheriff. Special bail was not put in within ten days, and on the 25th November the plaintiff took an assignment of the sheriff's bail bond, and brought this action.

Special bail was put in on the 28th, and perfected. On the same day notice thereof was given in the usual form, which concluded thus: "And that the said bail piece, together with the affidavit of justification, and of the due taking thereof, was this day filed in the office of the Deputy Clerk of the Crown in and for the County of Middlesex."

On the fifth day of December the bail obtained a summons to shew cause why the proceedings should not be stayed on the ground that special bail had been put in, in the original action, &c.

J. B. Read shewed cause and contended that though special bail was filed, and notice given after assignment of bond and before this application, yet that the bail were not in a position to apply, twenty days not having yet elapsed since the special bail was filed: that plaintiff has that time to except, because the notice of bail was not accompanied with an affidavit of justification: that bail did not therefore become perfected until that time should have elapsed, in the absence of any order for the allowance of the special bail (Rule 83 and 85 T. T. 1856), and that no notice of intention to justify had been given: *Goddard* v. *Jarvis*, 9 Bing. 88; *Turner* v. *Cary*, 7 East 697; Rule 55, T. T. 1856.

Marcellus Crombie supported the summons, and contended that the plaintiff had done all that was required of him, and was entitled to have these proceedings stayed on payment of costs. He cited *Burn* v. *Aguilar*, 3 East. 306; *Lepine* v. *Barrat*, 8 T. R. 223; *Turner* v. *Cary*, 7 East. 607; *Pairente* v. *Plumbtree*, 2 B. & P. 35; *Yonge*

v. *Shore*, 2 O. S. 314; *Whitehead* v. *Phillips*, 2 B. & Ald. 585.

John Wilson, J.—This application has been resisted, I think, on a misapprehension of the terms used in reference to the perfecting of bail, and the manner in which it is done.

The courts will stay proceedings, when by reason of a breach of the condition of a bail bond, a suit has been brought upon the bond, either at the suit of the defendant, the sheriff, or the bail, if the defendant has been rendered, or bail has been perfected. The plaintiff does not deny this, but contends that bail has not been perfected.

It is conceded, that the C. L. P. A. left the practice relating to bail just as it was before that Act.

In our courts, the practice differed from the practice in England, so far as the 2 Geo. IV., 2 Sess., the 4 Wm. IV. and our own rules changed it, and it is now regulated by the Rules of Trinity Term, 1856.

The long established course of practice has been to put in bail as was done here. The bail piece had an affidavit of the due taking thereof, and where intended to be perfected, it was accompanied with affidavits of justification. After it had been filed, notice of all this was given, as has been done here. The plaintiff was at liberty to except. If he did so without good reason, he had to pay the costs, if with good reason, the defendant had to pay them; but the object of excepting to bail, was to compel them to justify. If they had justified, nothing was gained by excepting to them. Nor was justification or allowance necessary where the object was to surrender the defendant.

The case of *Hodgson et al.* v. *Mee*, 8 Ad. & El. 765, is not like this, but it has settled the new practice on the points there under discussion on the analogy of the old.

The King v. *Wilson*, 3 Dowl. 255, recognizes the practice, that it is necessary before a motion to set aside proceedings against a sheriff is made, that bail should justify.

Here the defendants have put in and perfected the bail, which the plaintiff has confounded with the allowance of it.

The proceedings will be stayed on payment of the costs to be taxed in the suit on the bail bond, up to and including the 6th day of December, when this application was made.

Summons absolute.

See *Call* v. *Thelwell*, 3 Dowl. 443; 1 Chit. Ar. Pr. 9 Ed. 760–7; Lush Pr. 646; Rules of Trinity Term, 1856, Nos. 69, 72, 81, 83.

CHANCERY CHAMBERS.

(*Reported by* M. Charles Moss, *Student-at-Law.*)

Cameron v. Upper Canada Mining Co.

Unstamped affidavit of service of office copy of bill—Service of bill on corporation—Order pro confesso on such service—Order of court of 1857 in such cases.

The affidavit of service of an office copy of the bill should shew that the copy so served was stamped with the stamp of the Registrar's or Deputy Registrar's office in which the bill is filed.

A plaintiff cannot obtain an order *pro confesso* against a corporation *ex parte* under the orders of 1857 relating to orders *pro confesso* against corporations, unless the bill was served upon some of the officers of the company specified in the order, even although the Act incorporating such corporation makes it competent to the plaintiff to serve process upon a director.

[Chambers, January 16, 1868.]

The act incorporating the Upper Canada Mining Company provides, that it shall be competent for any party to a suit to which the company is a party to serve process upon the company by serving the president, secretary or any director in any place, or by leaving it at the head office of the company.

The bill in this cause was alleged to have been served upon a director on behalf of the company on the 5th December, and was subsequently served upon the President on behalf of the company on the 14th December.

On the 10th January the plaintiff obtained an order *pro confesso*, *ex parte*, against the company upon an affidavit of the service upon the director. The affidavit was not stamped with the stamp of the Registrar's office, though stating that the office copy served was stamped with a stamp similar to that in the margin of the affidavit.

Moss moved to set aside the order *pro confesso* for irregularity on the grounds:

1. That no proof of service of an office copy the bill upon the company was produced or filed upon the application for the said order.

2. That the affidavit of service filed on said application did not shew that any copy of the said bill stamped with the stamp of the Registrar's office, was served upon the said director or the said company.

3. That the said order was unauthorized, having been obtained upon proof (if any) of service of an office copy of the bill upon a director of the said company only.

As to the first and second objections, he argued that no service of a duly stamped office copy of the bill upon any person on behalf of the company was shewn. The orders require that each office copy of a bill shall be stamped with the stamp of the office of the Registrar of Deputy Registrar with whom the bill is filed; and if the attention of the court had been drawn to the fact that the affidavit produced did not shew that such was the case with the copy served upon the director, the order would not have been granted.

As to the third objection, he contended, that even if the service upon the director had been duly proved it would not authorize the taking of the bill *pro confesso* against the company under the order of 1857. The act of incorporation was passed long before that order was promulgated. The order was intended to meet the difficulty raised in cases such as that of *Counter* v. *Commercial Bank*, 4 Grant 230, where an order *pro confesso* could not be obtained even when service had been effected upon the President and Cashier of the Bank. And it provides that upon service of the bill upon a corporation, by personally serving any of certain specified officials, an order *pro confesso* may be obtained *ex parte*. But a director is not one of the individuals specified in the order, and it is distinctly shewn that the director here served does not occupy any of the positions in the company mentioned in the order.

Unless the service was made on some of the officials specified in the order, the plaintiff had no right to an order *pro confesso*, except such as he had before the order was promulgated.

Smart, for the plaintiff, argued that the affidavit was in the form given by the court, except so far as it was varied in accordance with the orders of February, 1865. He could now, if permitted to file a further affidavit, shew clearly that a proper office copy had been served. Service upon a director was good service upon the company under the act of incorporation, and authorized the order *pro confesso*. If the order was set aside it ought to be without costs: *Davis* v. *Barrett*, 7 Beav. 171.

Moss in reply. The order *pro confesso* must be upheld, if at all, upon the materials upon which it was granted. The answer of the company was ready for filing, and could have been filed on the 11th had not the order been obtained, and if the order had been refused on the 10th, as it would have been if the attention of the court had been called to the omission in the affidavit, the answer would have been filed before a proper affidavit could have been obtained. The present order should be granted with costs if granted at all. The order *pro confesso* was taken very unnecessarily, inasmuch as the plaintiff was aware from a letter from the company's solicitor, put in by plaintiff on this application, that the company intended to answer, and if the service upon the President was recognized as the first valid service upon them, the answer was not due till the 11th.

The Judges' Secretary.—I decline to permit a further affidavit to be filed. The plaintiff had ample notice and knew that the service was questioned, and should have come prepared to support it. I think the order *pro confesso* should be discharged with costs. There was really no evidence of the defendants having been served with an office copy of the bill, even had service upon the director been good service upon the company for the purpose of enabling the plaintiff to obtain this order, which it was not. Service upon him would not enable the plaintiff to take the bill *pro confesso* under the order of 1857.

(*Reported by* J. W. Fletcher, Esq., *Barrister-at-Law.*)

Upper Canada Mining Company v. Attorney-General.

Practice—Style of cause where bill dismissed as against one defendant.

Where the plaintiffs bill of complaint was dismissed against one of the defendants only, and a motion to dismiss for want of prosecution was subsequently made by the other defendants, a technical objection that the style of the cause of the notice of motion was incorrect (the name of the defendant as against whom the bill was dismissed appearing therein) was overruled.

S. H. Blake, on behalf of the defendants, the Wallace Nickel Mining Company and others, moved for an order to dismiss the plaintiffs' bill for want of prosecution.

Moss appeared for the plaintiffs and objected to the motion, on the ground that the notice was not in the correct style of the cause. The bill had been already dismissed as against the defendant Metcalf, who therefore was out of court; his name consequently should not appear in the style of the cause in any proceeding taken since the order dismissing the bill as against him. He had no longer any interest in the suit —to retain his name in the style of the cause would be useless and might mislead.

Blake, in reply, said that the practice had heretofore been to retain the name of a defendant in like cases where the bill had been dismissed.

The Judges' Secretary having taken time to consider, delivered the following judgment—

I overrule the objection. There are advantages in keeping the style of this cause as it originally stood. Where the bill is amended and the name of a party struck out, there are generally amendments in the body of the bill also. Here it would appear from the body of the bill that Metcalf is a party, and yet his name would not be in the style of the cause. *Barry* v. *Croskey*, 2 J. & H. 136, shews that where a defendant demurs successfully, he has a right to have his name struck out of the style of the cause, but he must make an application for this purpose.

Miller v. Hill

Practice—Striking name of person improperly made a plaintiff out of style of cause—Costs.

Where the plaintiff's solicitors made a person a party plaintiff without being instructed by him in that behalf, his name was, at the instance of such person, ordered to be struck out of the proceedings in the cause as a party plaintiff therein, with costs of the motion to be paid by the solicitors.

The bill was filed by the alleged directors of the Mutual Fire Insurance Company of Clinton, and the said Insurance Company, against certain persons now or at all events formerly directors of the said Company. The plaintiffs claimed to be the legally elected and acting directors; and one Stephen Haney, who had been a former director, as it was alleged, was included in their number. Steplen Haney, however, had given no instructions to the plaintiffs' solicitors to file a bill on his behalf, and had not in fact been consulted about the matter. He did not think the plaintiffs were right in filing said bill, and contended that he and the defendants were the legal directors of the company, and that the course of the plaintiffs was improper and illegal.

S. H. Blake, on behalf of Haney, moved, on notice, for an order to strike his name out of the bill and proceedings, with costs to be paid by the solicitors personally.

Hoskin, contra.

The Judges Secretary made the order, saying that the solicitors must pay the costs in so plain a case.

ENGLISH REPORTS.

HOUSE OF LORDS.

Xenos and Another v. Wickham.

Execution of Deed.

[16 W. R. 38.]

The main question in this case was whether a certain deed had been duly executed. A deed

is an instrument sealed and delivered, and it was contended, in *Xenos* v. *Wickham*, that there had been no sufficient delivery of the deed.

The plaintiffs, who were shipowners, instructed an insurance broker to effect an insurance upon one of their vessels. The broker agreed with the defendants, who were an insurance company (now sued in the name of their chairman) to effect a policy of insurance in accordance with the instructions he had received from the plaintiffs. The defendants made out the policy and signed and sealed it, and left it in the hands of one of their clerks to be given to the plaintiffs, or their broker whenever they might choose to call for it. After the policy was so made, the broker, without any authority from the plaintiffs, told the defendants that the insurance was cancelled. The defendants thereupon returned the premium they had received in respect of the insurance, and treated the policy as cancelled. Subsequently the plaintiffs vessel was lost, and the plaintiffs claimed the amount insured under the policy. The defendants refused to pay—first, on the ground that the policy had never been duly delivered as a deed, inasmuch as it had always remained in their possession. Secondly, on the ground that, even if the instrument had been duly executed it had been cancelled by the consent and at the request of the plaintiffs. The House of Lords decided both of these points in favor of the plaintiffs. Five of the judges delivered opinions on the case in answer to the questions of the House. M. Smith and Willes, JJ, thought that the defendants were not liable on the policy, while Pigott, B., Mellor and Blackburn, JJ., were of opinion that the defendants were liable. The House of Lords took this latter view of the case. The effect of the judgments of the Lord Chancellor and of Lord Cranworth is—that no technical act is necessary for the delivery of a deed. A deed may take effect although it is never delivered to the person who is to be benefited by it, or to any person on his behalf. "The efficacy of a deed depends upon its being sealed and delivered by the maker, not on his ceasing to retain possession of it." The deed purported to be signed, sealed, and delivered by the directors in the ordinary course of business, and if that did not make it binding upon the defendants, it is difficult to see what would have that effect. On the second point, viz, whether the broker had any implied authority to cancel the deed, so as to relieve the defendants from liability under it, the House also decided in favour of the plaintiffs. There was not so much difference of opinion on this question. Four out of the five judges who delivered opinions in this case thought that the broker's cancellation of the policy without express authority from his principals did not release the defendants: in other words, that an agent, to make a contract, has no implied authority to rescind it after it has been duly made by him. Willes, J., took a somewhat different view, holding that the transaction between the broker and the defendants was never completed and that the cancellation must be regarded as part and parcel of that transaction. The Lord Chancellor and Lord Cranworth followed on this point the opinion expressed by the majority of the judges.

IRISH REPORTS.

TALBOT v. TALBOT.

Costs—Imputations on the character of a solicitor or other officer of the court.

Where, in the course of any proceeding in the court, imputations are cast on the character of one of its officers, as such, he is entitled to appear for the purpose of defending himself therefrom, and to get his costs if successful.

[December 9, 1867—16 W. R. 201.]

In this case a motion was made on behalf of George Henry Talbot, the petitioner in one of several matters, under the following circumstances:—

George Talbot was entitled to a sum of £68 for costs, under a decree made in the suit in 1864. John H. Talbot, the guardian of a minor respondent in the same matter, was entitled, also under the same decree, to a sum of £117 for costs. In taxing the former sum, the taxing master had taxed the costs under the decree, and they thereby became, under the express terms of the decree, a charge upon a certain estate called the Castledawson Estate. In taxing the latter sum, the taxing master had taxed the costs against George H. Talbot personally. This sum was due to the former solicitor for John H. Talbot, Mr. Stephens, who threatened to issue execution against George H. Talbot for the amount, and the latter served notice of the present motion for an order to stay the issuing of execution or other proceedings, and for liberty to set off the said sum of £68 against a like amount of the said sum of £117. In support of the motion the solicitor for George H. Talbot made an affidavit containing some reflections on the character of Mr. Stephens as a professional man. Mr. Stephens instructed counsel to appear on the motion, and defend him from these imputations. The motion having been disposed of, application was made on behalf of Mr. Stephens, for the cost of appearing thereon. This was resisted, on the ground that he could take nothing by the motion.

WALSH, M. R., gave Mr. Stephens his costs, on the ground, that whenever imputations were made on the character of an officer of the court, as such, in the course of any proceedings before it, he was entitled to appear and defend himself from them.

UNITED STATES REPORTS.

HUNTINGTON v. OGDENSBURGH AND LAKE CHAMPLAIN RAILROAD COMPANY.

Where a person employed for a certain term at a fixed salary payable monthly is wrongfully discharged before the end of the term, he may sue for each month's salary as it becomes due; and the first judgment will not be a bar to another action for salary subsequently coming due.

(7 Am. Law Reg. 143.)

This was an action brought to recover for constructive services from the 1st of July to the 1st of September, 1866.

The plaintiff proved a contract for services as station agent for ten months, from March 1st, 1866, at $100 per month, payable monthly; that on the 7th day of June he was discharged without cause; that he had at all times held himself

ready to serve under said contract, and frequently tendered his services in pursuance thereof, and that during the time he had no other employment.

The defendant proved that on the 21st day of July, 1866, the plaintiff commenced an action against the defendant in a justices' court, to recover services under said contract for the month of June; that on the trial the plaintiff proved the contract, his discharge, readiness and offer to serve during said month, and defendant's refusal to employ him, and recovered a judgment for said month's wages.

At the close of the evidence the defendant moved for a nonsuit, on the ground that said judgment in the justices court was a *bar* to this action. By direction of the court, a verdict was entered for the plaintiff for $150, and the case reserved for further consideration.

Averill & Kellogg, for plaintiff.

Brown & Hasbrouck, for defendant.

The opinion of the court was delivered by

James, J.—The single question is, was the judgment rendered before the justice for the wages of the month of June under the contract, a bar to a further recovery for services tendered but not accepted. "It is settled law that only one action can be maintained for the breach of an entire contract, and that a judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding; but the difficulty is, to determine in what cases the contract is entire, and the question becomes much complicated in the consideration of agreements to do specific acts at various prospective periods."

Originally, *debt* was the only action to recover a sum certain; and it was held no action would lie to recover instalments on a bond, *in debt*, until all the instalments were due. But when the action of *assumpsit* was adopted, the rule was modified, and the plaintiff was allowed to proceed on the first default, although a judgment in such action was still held a full satisfaction. But this rule was further modified by a decision in the King's Bench in *Cook* v. *Wharwood*, 2 Saund. 337, in which it was held—"that when in an action on an award to pay several sums at several times, an action might be brought for each sum when due, that the plaintiff should recover damages accordingly, and have a new action as the other sums became due."

In Massachusetts (*Badger* v. *Titcomb*, 15 Pick. 437), it was held that a contract to do several things at *several* times, is *divisible* in its nature, and that an action of *assumpsit* would lie for every default. A note at 224 marginal paging, 3d ed. of Sedgwick on Damages, purporting to be from the case of *Fowler* v. *Armour*, 24 Ala. 194, says:—"If one contract to serve another for one year at a stipulated sum, payable monthly, and is discharged without any fault on his part, before the expiration of the year, he may treat the contract as still subsisting, and sue in *assumpsit* for wages due according to its terms; or he may consider it rescinded, and sue for unliquidated damages for its breach. If he sue on the contract he can only recover the wages due by its terms before the institution of the suit; if he sue for damages for breach of contract, he is entitled to recover the actual damages sustained up to the trial."

In *Thompson* v. *Wood*, 1 Hilton 93, the plaintiff claimed to recover two months' salary on a hiring by the year, he having been discharged without cause, and being ready and willing to perform; the defendant set up a previous action by plaintiff against defendant, to recover a balance due for services actually rendered, and breach of contract; the latter claim was withdrawn on the trial, and judgment rendered only for the balance due at the time of plaintiff's discharge; and it was held that such judgment was no bar. Ingraham, Judge, said: "When an agreement of this kind is broken, the person employed has his election, either to sue for his wages as they become due from time to time, or to bring one action for damages for the breach of the contract. If such action is brought before the term of hiring has expired, and the party recover damages for a breach of contract, such recovery estops him from bringing another action; but if his action is merely to recover the wages due at the time of bringing the action, he is not thereby deprived of his right either to recover wages subsequently becoming payable, or an action for damages for the subsequent breach of the agreement in not employing plaintiff according to the contract." According to the dictum of this case, the former recovery by the plaintiff here, is no bar to the present action; but the point was not necessary to a disposition of the case, the former recovery having been for services actually rendered before breach."

The defendant cited and relied upon *Colburn* v. *Woodworth*, 31 Barb. 381. The facts there were much like those here, except in the first action the plaintiff in his complaint, in addition to a quarter's wages, claimed damages for a breach of the contract, and issue was joined thereon, and a trial had on such pleadings; but the recovery was only for the quarter's wages, no other quarter being due when said action was commenced. The second action was for the second quarter's wages, and the court held the first action a bar, on the ground that in that action the plaintiff had counted for a breach, and that no other action could be maintained on the contract after that.

The real question raised in the present case, is, whether the monthly payments, by the terms of the contract, were several and distinct causes of action, arising as they became due, or whether they were single and entire.

In *Secor* v. *Sturgis*, 16 N. Y. 548, Justice Strong lays down this rule: "The true distinctions between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Each contract, express or implied, affords one and only one cause of action. A contract containing several stipulations to be performed at different times is no exception, although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action being the stipulation, which is in the nature of a several contract."

What then was the contract in this case. It was a hiring at $100 per month. It was therefore a contract containing several stipulations—each stipulation giving a right of action on its breach. There is no doubt the plaintiff could have maintained a separate action for each instalment as it became due, had he not been discharged, but continued to serve. Having been discharged *without cause*, his rights were not lessened; he was not bound to treat the contract as at an end. He *could* have done so, and brought his action for damages on the breach: or he could have waited for the expiration of the whole time, and brought his action for all the monthly instalments—but he was not bound to do either. *He had the right to treat the contract as still subsisting, and could maintain an action for each instalment as it fell due.* I therefore hold, that the action before the justice was no bar to this, and direct judgment for plaintiff on the verdict.

SUPREME COURT OF PENNSYLVANIA.

Flanagan v. Mechanics' Bank.

Bills and notes—Garnishee.

1. Evidence of failure of consideration between the original parties is inadmissible to affect the claim of an indorsee for value of negotiable paper acquired before maturity, and without notice.
2. Where by proceedings in foreign attachment, and on the *sci. fa.*, by a creditor of the payee, judgment is had against the drawer of such note, without any notice to the indorsee, the latter is not bound thereby.
3. To protect himself from a double liability the garnishee should notify the holder of the note, and call on him to interplead: or, if he cannot ascertain the holder he may show the nature of the paper, and its actual transfer as an answer to the attaching creditor.

Error to District Court of Philadelphia county.

The opinion of the court was delivered at Pittsburgh, October 31st, 1867, by

Thompson, J.—The bill of exceptions contains no exception to the charge; consequently we are confined in this review to those exceptions relating to the two items of rejected testimony.

The first of these was an offer, in substance, to show failure of consideration for the notes in question, long after their date and negotiation, but before maturity. To be more specific: the notes were dated respectively in December 1860 and January 1861, and drawn payable to the Insurance Company of Virginia. They passed into the hands of the Bank of the Commonwealth, of Richmond, and by it were transferred to the Mechanics' Bank, the plaintiff, on the 29th or 30th of April, 1861, in payment of a balance due by the former to the latter bank. The proposi was to prove that in June following the policies, for which the notes were given, were cancelled by the company with the drawer's assent. The plaintiff's title had accrued before this; and even if it had not this would have been no defence without notice of the failure of consideration, the notes being negotiable, and not due when received, and credited on account to the Commonwealth Bank. All this is too plain to require elucidation. The court below properly rejected the testimony.

2. The other exception is to the rejection of the record in foreign attachment, and the judgment in the *Sci. Fa.* against the defendant. The plaintiff below had no notice of that suit, was no party to it, and was not bound by the judgment. If it be supposed that because the process of Foreign Attachment is sometimes said to be in the nature of a proceeding *in rem*, the judgment against the garnishees, like proceedings in bankruptcy, decrees of distribution and in admiralty, and other like cases, is conclusive on everybody, it is a great mistake. It is said to be in the nature of a proceeding *in rem* because it is a process against the thing belonging to the debtor in the first place, and the judgment against the garnishee has relation to its value: 9 W. 488. But the controversy with, and as to the liability of the garnishee, is *in personam*, and concludes only the parties legally actors in it: 12 S. & R. 287; 9 W. *sup.* The learned judge very properly held the attachment and proceedings on the *sci. fa.* as *res inter alios acta*, and not evidence. The complaint of error in this particular is not sustained.

I think it was competent for the garnishee to have protected himself against a double liability by satisfying the holder of the notes of the attachment, and calling upon him to interplead. Or if he could not ascertain the holder he might have shown the nature of the paper, and its actual transfer. This would have been an answer, one would suppose, to the attaching creditor. We cannot well say, as a rule, that a debt due by a negotiable instrument is not liable to be attached for a debt due by the payee. There is no reason for saying it would not be simply because of its form. It is only when actually negotiated that there is a reason against it, and it seems to me the garnishee might and ought to protect himself in one or other of the modes suggested above. But we need not definitely determine this point in order to decide this case.

The other questions argued in the paper books, and not above noticed, are not before us; and any opinion upon them would be extra judicial and should not be given. The charge of the court is not before us according to any mode of proceeding for bringing it up: Vol. 1, p. 570, Fish's Tr. & H. Had the counsel for the defendant in error examined the bill of exceptions carefully they would have saved themselves and us some trouble.

Judgment affirmed.

GENERAL CORRESPONDENCE.

The Law of Evidence.

To the Editors of the Law Journal.

Gentlemen,—A bill was lately before the Legislature of Ontario to change the law of evidence in this Province. It proposed to allow plaintiff or defendant to testify in his own behalf in all courts. Happily, for the present, the Legislature has thrown it out; but it may not be amiss to give here a few reasons why it should never become law, especially as

it may be again brought forward, and is supported by such lawyers as Mr. Blake and Sir Henry Smith. I observed also a long and studied letter in its favor from ex-judge Kenneth McKenzie, Esq., in the *Globe* lately. This is the age of change, and many of the changes proposed are very bad ones, betokening a very poor knowledge of human frailties and vices. No change in the law in Canada could be worse than this.

Notwithstanding the letter of Mr. McKenzie, I feel satisfied that nine out of ten, if not more, of our Division Court and County Court Judges would not agree with him. Some men are too apt to be led away with every new thing in law. I know at least one County Court judge, of twice his experience, who entirely dissents from his view. Mr. Mackenzie's reasons are not good, and facts would not bear them out.

The law as it stands in these small courts (Division Courts) allows the judge at his discretion to call either party, or both parties, to testify, and this is as far as it should go. It should not allow the plaintiff or defendant to obtrude his evidence on the court. Too many changes in the old common law are to be opposed, and this especially.

It is said, if it is not allowed, failures of justice will often occur. That may be true, but they will occur with it, and at times under any circumstances. The advocates for the change assume, that men's principles and love of truth are stronger than their passions, prejudices and interests. Is it not a melancholy fact, known to all judges and practitioners in courts, that they are not so. Interests and passions will bias the oaths of a large majority of men. Why put this new temptation in their way?

There are two strong arguments (as it is said) in favour of this proposed new rule of evidence. First, it has been adopted in England, and second, it is used or adopted in effect in chancery proceedings, where the plaintiff is allowed to swear to the contents of the bill filed, and the defendant to his answer. Mr. Blake relied very much upon this chancery practice. He is a chancery lawyer, and wedded to the system. These arguments can be easily answered by the circumstances of our country, its floating inhabitants, and by reference to the decisions of judges in chancery suits. The population of England is more homogeneous than ours, less roving, tied as it were to the soil and localities; perjury also is more strictly punished there. In Canada it is a very difficult thing, a rare thing, to convict a person of perjury. Yet hundreds of cases of wilful perjury occur in our various courts. Moreover, who has ever said, after a long experience of facts, that allowing plaintiffs and defendants to testify in their own behalf in England upon the whole, advances the ends of justice, and does not promote perjury.

I am not going to say that the standard of morality among the people is not as high in Canada as in England. Sentimentalists have assumed that the abolition of capital punishment for murder would cause a decrease of the crime: that leniency to criminals lessens crimes. How little such people understand human nature, and past experience! Criminals who commit deliberate crimes will naturally reason on the consequences of their crimes, if they are punished for them. What value can be weighed in the balance, to be compared with the death penalty, where life is at stake? Imprisonment for life is eagerly grasped at by the sentenced criminal. He sees in hope a hundred chances of escape or even pardon.

When perjury is committed it is committed because, upon reflection, the perjurer thinks his bosom only contains the secret of the truth. He will depend upon his assurance, his plausibility, his skill, in setting up a good case, whilst his opponent, from sheer stupidity may be unable even to explain a truthful one. Such conduct could easily deceive jurors or even judges. A merchant brings into court his books, has control over hundreds of the inhabitants, even the jury, it may be, and may swear hundreds or thousands of dollars into his pocket. A man may have done business by an agent and know little or nothing of the facts of a suit, and the defendant have done his part of the business himself. Now, suppose the agent dies, if this new rule prevailed, one party could swear to nothing at all; the other might swear as he chose. The only one who could convict him of perjury is dead!

Suppose the question in suit is the retainer of a lawyer or its terms, and the defending party a farmer, and the latter allowed to give his evidence of the whole matter to a jury of

farmers, who doubts the results? Suppose (as I saw within a month past) two persons, gentlemen in Toronto, appear in the Division Court to contest a question of the allowance of certain commissions, amounting to nearly one hundred dollars. The character of these gentlemen was unimpeachable. They were examined as to palpable facts in issue by the judge, and swore to facts quite different the one from the other. How was the judge to decide such a case upon their sole evidence (as was the case here) except he nonsuit, or in effect pronounces the one or the other perjured? Who has a right to pronounce the judgment of condemnation? How often would it happen that similar cases would occur if this new rule of evidence were in force in Canada?

Would it not be better, and more for the ends of justice, if each party to a law suit were compelled to make out his case by evidence, and if either plaintiff or defendant wished to call the other to testify, let him do it. In the smaller courts the discretion is with the judge, as it should be.

As for Chancery proceedings, I think I can safely say that, although the parties to the suit testify, the judge very seldom gives judgment, or relies upon the evidence of a party interested. It is, after all, extraneous evidence, circumstances or documents, that rule the judgment.

Whilst writing this, I noticed a judgment in a case of alimony, lately given by Vice-Chancellor Spragge—*McPherson* v. *McPherson*—from Prescott. It was decided on bill and affidavits filed on an application to discharge the husband from arrest, on a *ne exeat regno*, for alimony. Here was the wife, a young woman, swearing positively to specific acts of cruelty, desertion, and threats to leave Canada. On the other hand the husband, an aged and respectable farmer, swore in direct opposition to his wife, that she was the real culprit, and denied acts of cruelty, and any intent to leave Canada. Now, here is a sample of hundreds, perhaps thousands of cases that have been decided in the Court of Chancery in past years. Vice-Chancellor Spragge, not relying on the evidence of either husband or wife, but taking the affidavits of third parties, members of the family, with some circumstances, decided the case entirely on the latter. *Cui bono*, then, was this swearing of the parties.

Let curiosity dive into the musty files of bills and answers, affidavits and examinations in the Court of Chancery at Osgoode Hall, and see what a mass of contradictions, and prejudices too, can be found, where parties litigant have tried by their oaths to uphold their interests. Yet Chancery lawyers (some of them) love the rule. By the common law rule justice may fail at times for want of evidence, but it is gratifying to think at least that perjury did not cause it. People often lose their cases by bad management, for want of business tact, for want of written documents, for want of calling witnesses, and experience should teach them better. Merchants may take receipts for goods sold on credit, lawyers can take written retainers, verbal bargains can be reduced to writing. C. M. D.

Toronto, 26th Feb., 1868.

Assignees in Bankruptcy Matters—The operation of the Act.

To the Editors of the Canada Law Journal.

Gentlemen,—When the present Bankrupt act was passed, every one supposed that an act so long talked of, or should be nearly perfect. The working of the act since 1864, clearly, on the contrary, proves it to be a bungled, defective affair. I propose to point out a few of its defects, and in addition to refer to the conduct of *official assignees*.

Every one knows that the profession of the law is being over-crowded in Canada, and this is not a time when lawyers should silently permit persons who are not lawyers to take the business that legitimately belongs to the profession from them. I have waited in hopes that some other person would draw the notice of the profession to the fact, but seeing no person has done it, I will do so.

Every lawyer who has watched closely the actions of official assignees, especially in Toronto, knows well that these individuals are generally selected by the insolvent, to get him through for a certain fee, generally $50! This fee is in fact a retainer, and except in special cases of difficulty, a professional man is never thought of. One would have supposed, and such was certainly the intention of the act, that the assignee was peculiarly the officer of the creditors, or at least one who stood per-

fectly impartial and unbiased between insolvent and creditors. If the assignee is the paid agent, or rather the *pettifogging paid and unlicensed lawyer* of the insolvent, it is easy to be seen that he will use every means in his power *to slip his client through*, regardless of creditors! The Bankrupt act was passed to enable honest, but unfortunate men, who were willing to give up all their property, and who are not guilty of fraud, to obtain a discharge. A majority, I fear, in Canada who avail themselves of it, and not a few assignees who aid them in it, think that it was an act to white-wash debtors and to enable them to slip through its meshes, with as much property out of their hands, in trustees or corrupt agents possession, as possible. Many who go through do so honestly, but I verily believe, from a large observation of such things, that a majority of rogues get through, with large secreted funds. One of the essential requisites to a proper discharge of an insolvent, is the certificate of the assignee, that the insolvent has complied with all the provisions of the act, has attended all meetings, has filed a statement of his affairs on oath, fairly showing how he disposed of his property, &c.

This certificate, very improperly, is too often overlooked by judges. See *In re Wilson*, 9 L. T. N. S. 498; 12 W. R. 221; *Re Brooks*, 5 L. T. N. S. 727; Deacon's Law of Bankruptcy, 703–4. Now if the assignee has received his fee beforehand from the insolvent it is not his interest to see closely after such things. It is his interest, in league with his client, to publish his application for discharge, or other notices, in the cheapest and most obscure newspaper he can find, and having no *professional responsibility*, to get his client through, even if all is not right. And I believe yet that many an insolvent will find to his sorrow, that all his papers are not right.

And now as to the defects of the Act. I think it should be distinctly enacted, that if a man has once gone through the Insolvent Court he should not again go through without paying 10s. in the £; or some such clause should exist. It should be distinctly provided, that the insolvent should give personal notice, or at least through the post, to every creditor, of his last application for discharge. It seems this is not required of insolvents. I question the legality of this. It should be distinctly said that *no assignee should act as the agent* of the insolvent under a penalty. It should be enacted that judges should have power to impose terms of costs on assignees, creditors, or insolvents for improper conduct, contempts or delays. It should be enacted that a creditor should have power to appeal against a judge's order of discharge at any time within, say, three months, upon filing security. The eight days now given is too short. It should be enacted that judges should have power to require the insolvent, under certain suspicious circumstances, to pay a certain rate in the £ to his creditors, and in the meantime the discharge to be suspended. It should be enacted distinctly (there is now some doubt on the subject) that the insolvent shall be discharged only from the debts or liabilities mentioned in his schedule of debts, which schedule should be in all cases appended to, and be legally considered, a necessary part of his assignment. It should be enacted that the insolvent should assign to an assignee in the county where he became insolvent. This clause would be only just to creditors.

I might allude to other defects but space will not admit.

Scarboro.

Toronto, Feb. 20, 1868.

APPOINTMENTS TO OFFICE.

CLERK OF EXECUTIVE COUNCIL.

JOHN SHUTER SMITH, Esquire, to be Clerk of the Executive Council of the Province of Ontario, in the room and stead of Robert G. Dalton, Esquire, resigned. (Gazetted 1st February, 1868.)

COUNTY ATTORNEY.

JULIUS POUSSETT BUCKE, of the City of Ottawa, Esquire, to be County Crown Attorney in and for the County of Lambton, in the room and stead of Timothy Blair Pardee, Esquire, resigned. (Gazetted 1st Feb, 1868.)

DEPUTY CLERK OF THE CROWN.

SAMUEL REYNOLDS, Jun., Esquire, of the Town of Prescott, to be Deputy Clerk of the Crown and Pleas for the United Counties of Leeds and Grenville, in the room and place of W. H. Campbell, resigned. (Gazetted 8th February, 1868.)

POLICE MAGISTRATES.

DONALD BETHUNE, Esquire, Q.C., Barrister-at-Law, to be Police Magistrate in and for the Town of Port Hope. (Gazetted 1st February, 1868.)

NOTARIES PUBLIC.

JAMES F. MACKLEM, of the Village of Chippewa, Gentleman;

FRANCIS ALEXANDER HALL, of the Town of Perth, Gentleman;

JAMES FLEMING, of the Town of Brampton, Esquire, Barrister-at-Law, and

SAMUEL McCAMMON, of Gananoque, to be Notaries Public in and for the Province of Ontario. (Gazetted 1st February, 1868.)

CORONERS.

JOHN D'EVELYN, of the Village of Woodbridge, Esquire, M.D., to be Associate Coroner in and for the County of York. (Gazetted 1st February, 1868.)

DIARY FOR APRIL.

1. Wed.. Local School Superintendent's term of office begins.
5. SUN.. 6th *Sunday in Lent.*
6. Mon.. County Court and Surreg. Court Term begins.
7. Tues.. Local Trustees to return arrears of taxes due to County Treasurer.
10. Frid.. *Good Friday.*
11. Sat. .. County Court and Surrogate Court Term ends.
12. SUN.. *Easter Sunday.*
13. Mon.. *Easter Monday.*
19. SUN.. *1st Sunday after Easter.*
23. Thurs. *St. George.*
25. Sat. .. *St. Mark.*
26. SUN.. *2nd Sunday after Easter.*
29. Wed.. Appeals from Chancery Chambers.
30. Thurs. Last day for non-residents to give list of lands or app. from assessmt. Last day for Local Clerks to ret. occu. lands to Co. Treasurer.

THE

Canada Law Journal.

APRIL, 1868.

LAW ACTS OF LAST SESSION.

It cannot be said to be too late to refer to the law legislation of the Session of the Legislative Assembly of Ontario which closed in the beginning of March last, when the public have not yet been placed in a position, by the publication of the statutes by the proper authorities, to judge of what was then done. But for some, to us at least, unknown reason, the majority of those who are required to obey the law are still unprovided by those who have made them, with the usual means of instructing themselves in what the law, by an amusing fiction, says we knew, marked, learned and inwardly digested on the fourth day of March last.

We have done what we could to supply our subscribers with copies of such of the acts as seemed of the most importance, but this is necessarily only a partial benefit. We trust that it may not be long before a large issue of the first volume of the Statutes for the Province of Ontario may be distributed. Economy in matters of this kind is but short-sighted policy, whilst delay is a great evil.

The difficulties that may arise from want of a prompt distribution of the Statutes, are increased by their having come into operation immediately upon receiving the assent of the Lieutenant-Governor. This remark is particularly applicable to such an act as that relating to executions against goods and lands, for, from what we have already seen, it seems highly probable that many execution creditors have not retained the priority to which they were entitled, merely because they did not know (and could not very well have ascertained in some cases) that an alteration had been made in the law by the act referred to.

A stranger to our laws might have supposed, judging from the mass of Bills introduced during the Session, that the laws of this country were in a most defective state, and that, but for the energy of the new Parliament, the population in general would have been in a bad way. But things are not so bad as that, nor is it every change in a law that is beneficial, and we were glad to notice that as a rule the members, with a few notable exceptions, did not fail to remember that there is now no check in hasty legislation in the shape of a second House.

In addition to the acts published in our last issue, we may notice the Registry act, which makes several changes rendered necessary by the great want of care displayed in the former act. It cannot be said that the present measure is now perfect, but perfection, or anything in the neighbourhood of it, is not to be expected in such a difficult branch of the law as that affecting and affected by the Registration of titles. One great source of difficulty might perhaps be remedied by degrees, by the appointment of thoroughly qualified professional men as Registrars, competent to judge of the many points of real property law that so frequently arise in the conduct of the business of a registry office, and to put a reasonable interpretation upon the act. A proper step has been taken in a different direction by preventing Registrars or their subordinates from acting as conveyancers; a wholesome provision, which we shall be glad to see extended to others outside registry offices, many of whom, though thoroughly incompetent even to do the simplest species of conveyancing, hesitate not to draw special deeds and wills, the form and effect of which would cause much anxious thought and care even to a well educated lawyer.

There is also—An act to amend the Municipal Institutions Act of 1866: an enactment which does not pretend to be anything more than a temporary measure to remedy a few prominent defects in that act; full legislation on the subject is to abide the results of extended enquiries into the municipal system. Also

an act to provide for the organization of the territorial district of Muskoka, and the appointment of a stipendiary magistrate (an office which has been filled by the appointment of Charles W. Lount, Esq., Barrister-at-law, and an act respecting the interpretation and construction of Statutes.

The Act to amend the Common Law Procedure Act gives very extended powers to the judges in certifying for costs, and will we think on the whole operate beneficially to suitors; it would seem however to be open to the objection that it takes away from practitioners a guide they formerly had, as to what court should be chosen wherein to bring certain actions, occasionally a matter of doubt even under the former law. It is presumed, however, that the judges will exercise the wide discretion now given them in accordance with the general rules which have heretofore guided them in matters of this kind. The latter part of the enactment was passed in the interest of sheriffs, and is in the main a matter of justice to them; it will also in many cases act beneficially to judgment debtors, by allowing sheriffs to deal less harshly with them, than they might be inclined to do if leniency on the part of sheriffs might result in the loss of their poundage.

The act respecting overholding tenants, which repeals 27 & 28 Vic. cap. 30, contains a few words especially deserving of notice, as they give a much wider scope to this act, than had the one it repeals. The latter part of the second section extends the operation of the act "*to all other terms, tenancies, holdings or occupations*," as well as to tenancies from week to week, from month to month, from year to year, and at will—thus in effect, apparently, giving a process of ejectment, formerly to be attained only by the ordinary writ of summons in ejectment.

The act as to executions against lands and goods has already been referred to. It yet remains to be seen whether the present enactment, which however promises well, will obviate the evils felt under the former act. The subject is not an easy one to handle, and difficulties may yet arise which this act may not meet, or may even give birth to.

The acts introduced by Mr. Blake, providing for additional examinations of articled clerks—respecting voluntary conveyances—relating to the purchase of reversions—and to settle the law of auctions of estates, are all most desirable, and such as might have been expected from a lawyer of his ability. We have much hope that the act respecting attorneys will materially raise the standard of the profession, so far at least as legal attainments are concerned; and if it has the effect of showing some young gentlemen the advisability of their choosing another profession or business at the outset of their career, so much the better for all concerned.

The act respecting proceedings in Judge's Chambers has not yet been acted upon, though if there ever was a time when some provision to facilitate Chamber business was necessary, the present assize period is that time. It was quite sufficient that the learned Queen's Counsel who has for the time being taken the duties of the Chief Justice, on the Home Circuit, should perform those duties, as he has done, to the entire satisfaction of the profession, without burdening him with matters of practice, which, to decide promptly and correctly on the spur of the moment, requires the daily experience of Chamber practice for years. It was thought, however, as we understand, that there are grave doubts as to whether this act does not go beyond the powers of the Local Legislature, which has nothing to do with the appointment of the judiciary, and that therefore no appointment was made under it.

Of the bills which did *not* become law—and their name in the aggregate was legion—we may refer to the following:

A bill to amend the law of evidence, by allowing parties to suits to testify on their own behalf, is the most important. This proposed measure has been so freely discussed that it is not now intended to refer to it further than to express our opinion that, however proper such a law is in theory, and consonant as it is with our convictions as to what the law ought to be under other circumstances, and however well it may have worked in England, it is not a measure which, in the present state of things would be expedient here; though the time may come when the alteration of existing circumstances of the country, (which however we cannot at present discuss at sufficient length,) would change the balance in favor of the passing of such a measure as was proposed, and, after much careful consideration, rejected.

The following are also amongst the Bills that did not become law—A bill to abolish the Heir and Devisee Commission, and give the like powers to Judges in Chambers, which would facilitate business and save time to applicants—A bill to amend the Act respecting Division Courts, containing some valuable and well drawn clauses, reflecting much credit upon its introducer, Mr. Coyne, but which, as a whole, it was best not to pass—A bill to amend the Act for the Partition of Real Estate, which, by giving Judges in Chambers powers now held only by the full Court, and by simplifying the procedure, &c., would materially increase the benefit of the act; an act of this nature might, we think, be usefully supplemented by numerous forms—A bill to quiet the titles of persons holding lands formerly sold for taxes — about as objectionable a measure, at least so far as one could judge from the copies distributed, as could well be imagined, but which would not have been allowed to pass in its present shape, we venture to say, even if there had been time for the purpose, and irrespective of the question, whether it is desirable or not to preserve tax titles from destruction, owing to defects and irregularities in the sale or otherwise.

The legislation of this the first Parliament of Ontario will be regarded with much interest; and upon the whole, we think there is no just ground for complaint that the new Legislative Assembly, principally composed, as it is, of beginners in the science of law-making, has in the matters here alluded to fallen far short of the wisdom of its more experienced predecessors.

ACT FOR QUIETING TITLES.

It was provided by the last general orders issued for the conduct of cases under this statute, that in case there should be any defect in the evidence of title, or in the proceedings, the petitioner or his solicitor should be informed of the same, so that the defect might be remedied, before an attendance before a judge with the petition and papers for approval.

As titles are frequently brought before the Referees in a defective state, or which bring up new or difficult points, it would, we think be desirable to lay before our readers notes of such cases of general interest as the Referees may enable us to publish. They have kindly consented to assist us in this matter, and from the high position which these gentlemen hold as real-property lawyers, their notes will be the more appreciated.

We have through the kindness of Mr. Turner obtained the information transmitted by him in a case now before him, which gives some useful hints, as well to conveyancers as to those of laying titles before the Referees for investigation.

SELECTIONS.

MR. JUSTICE SHEE.

It is with the most unfeigned regret that we announce the decease of Mr. Justice Shee, which took place a few minutes after 8 o'clock on the morning of the 19th inst., at his residence in Sussex-place, Hyde Park Gardens. It is not easy to say of what particular malady he died, but there is too much reason to believe that his illness originated in the unhealthy atmosphere of the court in which he has been presiding. On the 7th inst. he discharged his duties as one of the justices of the Queen's Bench, and delivered judgment in an important case. He had been complaining a litttle previously, but on the following day he was taken seriously ill. He, however, on Monday rallied a little, but on Tuesday he became worse, and his strength gradually ebbed, notwithstanding his robust constitution.

Mr. Justice Shee was the eldest son of Joseph Shee, Esq., of Thomastown, County Kilkenny, and Belmont Lodge, South Lambeth, who was a London merchant, by the daughter of John Darrell, Esq, of Scotney Castle, an old Kent Roman Catholic family. He was born at Finchley in 1804. Being a Roman Catholic, he was educated at Ushaw College, and at Durham and Edinburgh. He married, in 1837, Mary, daughter of Sir James Gordon, Bart., of Gordonstown, the Premier Baronet of Scotland. It is understood that Sir William Shee was a near relative of the late Cardinal Wiseman. He was called to the Bar at Lincoln's-inn, in June, 1828, and joined the Home Circuit, of which he became the most popular leader of any of the many distinguished men which that Circuit produced. Whilst a junior he earned a high reputation for diligence. His speeches in the great *Angel case* are within the recollection of most of our readers, as well as those which he delivered in the *Hudson* v. *Slade case*, in the *Bewick case*, in *Palmer and Roupel's cases*, and though last, not least in the *Seymour* v. *Butterworth case*. He became a Serjeant in 1840, received a Patent of Precedence in 1845, and was made Queen's Serjeant in 1850. He became a justice of the Queen's Bench in 1864. His reputation as a lawyer was proved by the publication of several editions of Lord Tenterden's book on Shipping, the eleventh edition of which he brought

out at the close of last year, as well as by his edition of 1861 of "Marshall on Maritime Insurance." He was M. P. for the county of Kilkenny from 1852 to 1857; he subsequently, at the general election in that year, contested that county again, but was defeated. In 1847 he unsuccessfully contested the borough of Marylebone, and in 1863 stood for Stoke-upon-Trent with the like result. In politics he was a Liberal, and was the first Roman Catholic raised to the English Bench since the Reformation.

There never lived a more painstaking, conscientious, and upright judge. He was most gentle, generous, and kind, even to the youngest member of the profession, both at the bar and on the bench. He was entirely devoid of bigotry, a most eloquent advocate, an honest man, an upright judge, and a truly Christian gentleman.—*Solicitor's Journal.*

Lord Cairns, who has succeeded Lord Chelmsford as Lord Chancellor, is the second son of the late William Cairns, Esq., of Caltra, Co. Down, and was born in 1819. He was educated at Trinity College, Dublin, where he obtained several first honours in classics, but being fellow commoner he did not go in for honours at his degree. He was called to the bar at the Middle Temple in January, 1844, and became a Queen's Counsel and Bencher of Lincoln's Inn in 1856. He entered Parliament, as M. P. for Belfast, in July, 1852, and in February, 1858, on the formation of Lord Derby's second administration, he was appointed Solicitor-General, in succession to Sir Henry Keating. In 1862 he received the honorary degree of LL.D. from the University of Cambridge. In July, 1866, on Lord Derby's return to power for the third time, Sir Hugh Cairns succeeded Sir Roundell Palmer in the office of Attorney-General. In February, 1867, on the resignation of Sir James Knight Bruce (immediately followed by his death), Sir Hugh Cairns was raised to the bench as one of the Judges of the Court of Appeal in Chancery, and was soon after created a peer by the name, style, and title of Baron Cairns, of Garmoyle, in the Co. of Antrim. During his tenure of office as a Judge of Appeal, Lord Cairns has been deprived of his Colleagues on two different occasions—first by the death of Sir George Turner, and secondly by the resignation of Sir John Rolt on account of ill health. Lord Cairns married, in 1856, Mary Harriet, daughter of the late John M'Neile, Esq., of Parkmount, Co. Antrim.

Sir William Page Wood, Vice-Chancellor, who succeeds Lord Cairns as one of the Judges of the Court of Appeal in Chancery, is the second son of the late Sir Matthew Wood, Bart. (M.P. for London, and twice Lord Mayor of the city), by the daughter of John Page, Esq., of Woodbridge, Suffolk. He was born in London in 1801, and was educated at Winchester school and at Trinity College, Cambridge, where he took a wrangler's degree (B.A.) in 1824, and was elected a fellow of that College in the following year. He was called to the bar at Lincoln's Inn in November, 1827, and was created a Queen's Counsel in 1845. He was elected M.P. for the city of Oxford in 1847, and was appointed Vice-Chancellor of the County Palatine of Lancaster in 1849. In March, 1851, he was appointed Solicitor-General, in succession to Sir Alexander Cockburn, who became Attorney-General on Sir John Romilly being appointed Master of the Rolls. He continued in office as Solicitor-General till February, 1852, when, on Lord Derby becoming Prime Minister, he gave place to Sir Fitzroy Kelly. In December of the same year, however, on the return of the Whigs to power, he was appointed a Vice-Chancellor, which office, he has ever since continued to hold. Sir William Page Wood married, in 1830, Charlotte, only daughter of Edward Moon, Esq., of Great Bealings, Suffolk.

The change in the occupant of the woolsack has given Great Britain, for the first time an Irish Lord Chancellor. Since the retirement of the last clerical Lord Keeper, Bishop Williams, in 1625, there have been (inclusive of Lord Cairns) 89 Chancellors, of whom 81 have been English, three—Herbert, Jeffreys, and Trevor—Welsh, and three Scotch—Loughborough, Erskine, and Campbell. The late Lord Lyndhurst, American in origin if not by nativity, and the newly-appointed holder of the Great Seal, makes up the tale. It is a curious fact, as exemplyfying the *etente cordiale* of the bar of Scotland and England, that about 50 years ago the Chief Baron of England was a Scotsman, and of Scotland, an Englishman. May Ireland be as intimately associated with us!—*Atlas.*

PROFESSIONAL SUSCEPTIBILITIES.

Professional susceptibilities exhibit themselves in such various ways, and are affected or disturbed on such different points that it would be difficult if not impossible, accurately to enumerate and describe them all. There is, however, one kind, the wisdom of which, while appreciating its *raison d'etre*, and understanding the temptation to give way to it, we venture to call in question. We mean that which, regarding professional acquirements and learning as a species of sacred mystery, grudges to the public any explanation or enlightenment concerning them. There is, for instance, among the clergy an obvious impatience at seeing or hearing their dogmas or doctrines handled by laymen. Wherever the sacerdotal cast of character prevails this feeling prevails. For those clergymen who lament public discussion of doctrine and discipline we confess we have but little sympathy In pure theology, no doubt, a clever, trained theologian might trip up a very able lay antagonist; but it is of the last importance that the ultimate

consequences, no less than the present tendencies of dogma and doctrine, should be clearly and authoritatively stated, and fully and fairly laid before the public. Lawyers are commonly of a different mental calibre. With regard to law, nothing is so beneficial to the public generally as that the fact that the law is supreme should be thoroughly accepted, and that the principles, though not the technicalities of certain portions of it, should be universally understood. Lawyers, as a rule, are too sensible to objcet to any efforts in this direction, and the law journals, which are mostly distinguished by their unimpassioned tone, stand aloof, except to correct mistakes made in legal matters in other papers. The kind of articles, full of ability and learning, not unfrequently met with in the daily press on such subjects as bankruptcy, conspiracy, fraud, &c., and other branches of the criminal law, are often of immense assistance in clearing the views and in forming the judgment alike of electors and of legislators, and bear no kind of resemblance to the hand-books written, in popular phrase, to instruct the public rather in the technicalties than in the principles of the law. Lawyers view these kind of publications either with supreme indifference or with malignant satisfaction, feeling certain that he who reads and acts on them will assuredly be delivered, sooner or later, bound and helpless into their hands. The man who on the strength of this sort of reading, makes his own will, and draws up his own lease or conveyance, always involves himself in practical difficulties which the most ordinary professional man would have instinctively avoided. The effect on an educated man of the study of a really able work on the technical part of law is to cause a solemn determination not to encounter legal difficulties without the best legal advice; and so it is with medicine. But the members of the medical profession are not so constituted as to be open to this kind of consolation. With all the generosity, benevolence, learning and knowledge of the world, which many of them possess in an eminent degree, they have not the *sang froid* which distingnishes lawyers, and as a rule they do not like to have their proceedings and professional mysteries exposed. They argue that the indiscriminate study of medicine leads to worse or more dangerous consequences than that of law. That is doubtful. If a man by meddling in law ruins his position in life, his health generally goes too; while if a man gets on permanently ill terms with his own stomach by dabbling in medicine, it need not injure either his income or his position. An interminable law-suit, with an ever increasing bill of costs, is equal to a malignant cancer; and a wretched trustee, duped and broken in fortune by his own rash self-confidence, is as badly off as a man with a chronic liver complaint. —*American Exchange.*

ONTARIO REPORTS.

ELECTION CASES.

(Reported by HENRY O'BRIEN, *Esq., Barrister-at-Law, Reporter in Practice Court and Chambers.)*

REGINA EX REL. WM. ADAMSON V. JOHN BOYD.

Municipal election—Payment of taxes by voters and candidate—When election commences—No fee to voters of candidates disqualification—Surrender of tenancy.

B. and A. were partners occupying premises as co-tenants under a yearly tenancy on the terms of an expired lease. Before the nomination day for a municipal election they dissolved partnership, B. leaving the business and premises, of which A. remained in possession. A. shortly afterwards went into partnership with S., and the new firm then took a fresh lease of the premises from same landlord.

Held, 1. That B. was not at the time of the election the co-tenant of A., the tenancy having been surrendered by operation of law.

2. That the non-payment of taxes by a candidate before the election disqualifies him.

3. That municipal elections commence with the nomination day, and the disqualification of a candidate has reference to that day.

4. If a candidate claims to be elected by reason of the disqualification of his opponent he must so distinctly claim it at the nomination, and also notify the electors that they are throwing away their votes.

[Common Law Chambers, March, 1868.]

This was a writ of summons in the nature of a *quo warranto*, calling upon John Boyd to show by what authority he exercised and enjoyed the office of Alderman for the Ward of St. David, in the City of Toronto, and why he should not be removed therefrom, and William Adamson be declared duly elected and be admitted thereto, on grounds disclosed in the statement of said William Adamson, and the affidavits and papers filed in support of the same.

The statement and relation of William Adamson of the City of Toronto, wharfinger, complained that John Boyd, of the said city, merchant, had not been duly elected and had unjustly usurped and still usurped the office of Alderman in said City of Toronto, under the pretence of an election held on Monday, the 6th day of January, 1868, at Toronto, for the Ward of St. David, in said City of Toronto, and that he, the said Adamson, was duly elected thereto and ought to have been returned at such election as Alderman for said Ward, and declared that he, the said Adamson, had an interest in said election as an elector and as a candidate for said office of Alderman, and stated the following causes why the election of the said John Boyd to said office should be declared invalid and void, and he, the said Adamson, be duly elected thereto.

1st. That said John Boyd was not possessed of the qualification required by law to enable him to be a candidate for or to be elected to the said office, inasmuch as he, the said John Boyd, had not, at the time of the election, in his own right, or the right of his wife, as proprietor or tenant, a legal or equitable freehold or leasehold, rated in his own name on the last revised assessment roll of the said City of Toronto, of the value required by law, the said John Boyd having parted with his interest in the leasehold property in which he is apparently assessed as a partner of the firm of "Boyd & Arthurs," long before the time of the said election, and not be-

ing rated for any other real property for a sufficient amount to qualify him as such Alderman.

2nd. That the said John Boyd was further disqualified in this, that he had not on the 23rd day of December last, being the day appointed for the nomination of candidates to fill said office of Alderman, paid all municipal taxes due by him in the Ward of St. Lawrence, in the City of Toronto, in compliance with the requirements of the statute in that behalf, and that there was on that day due from and unpaid by him the sum of $518 40 for municipal taxes on the real and personal property for which he was rated in the Ward of St. Lawrence, and that such taxes were not paid until the 4th day of January, 1868.

3rd. That said John Boyd had not a majority of legal votes at said election, inasmuch as the following persons who voted for said John Boyd were not qualified to vote, not having paid all municipal taxes due by them for the year 1867, in the City of Toronto, on or before the 16th day of December, 1867, as required by statute in that behalf (mentioning fifty-seven names); and that by the striking off from the poll at said election the names of said persons who illegally voted for said John Boyd, the relator had a majority of the legal votes on said poll.

4th. That the relator protested at the time of said election against the votes of the electors being received and recorded for said John Boyd, and publicly notified both the returning officers and the electors that the votes of the electors would be thrown away if recorded for said John Boyd, in consequence of said John Boyd not being legally qualified according to the provisions of the act of parliament in that behalf.

The relator made affidavit that he was a duly qualified municipal elector for the Ward of St. David, in said City of Toronto, and at the last municipal election, held on 6th January, 1868, was a candidate for the office of Alderman for said Ward of St. David, and that he believed the several grounds of complaint, as set forth in the above statement, were well founded.

It appeared from the last revised assessment roll for the Ward of St. David for 1867, that the residence of the defendant was assessed to him as tenant, and to John Smith as owner, for $8,000; and by the last revised assessment roll for the Ward of St. Lawrence, for 1867, the warehouses on Wellington Street were assessed to Boyd & Arthurs as tenants, and to Mr Todd as owner, for $14,560; and Boyd & Arthurs were further assessed for the sum of $20,000 for personal property, making in all $34,560; upon which the taxes for 1867 amounted to $518 40.

The taxes in the Ward of St. David were admitted to have been paid in time, but the taxes in St. Lawrence Ward were not paid until the 4th January, 1868, after the day of nomination, but before the polling day.

The property in St. David's Ward was in itself a sufficient qualification.

The defendant and Arthurs were tenants of the warehouses in St. Lawrence Ward, under a lease from Mr. Todd, for three years, from the 1st day of May, 1863. After the expiration of this lease, on the 1st day of May, 1866, they held over as tenants from year to year, as the defendant alleges, and paid one year and one quarter's rent. During the three months between the 1st of May and the 1st of August, the partnership between them was dissolved, the defendant retiring, leaving Arthurs in possession of the business and of the warehouses in which it was carried on. On the 1st day of August last, a new lease of the warehouses was made by Todd to John Smith and G. A. Arthurs, who, after the dissolution of the firm of Boyd & Arthurs, had formed a new copartnership, and have ever since carried on business there

In the affidavit of Mr. Todd, attached to the new lease, he said that Mr. Boyd had not then, nor had he since the date of the said lease, any interest either legal or equitable in the said lands and premises, or any part thereof.

In answer to this, Mr. Boyd said that he was neither party nor privy to the lease in any manner to John Smith and George A. Arthurs, nor did he know of the execution thereof, till after the day of the election: that he never surrendered to Mr. Todd the old lease, nor the term thereby granted, nor the term he might in law have in the same and the premises therein mentioned, as co-tenant with the said G. A. Arthurs from year to year.

In a subsequent affidavit, Mr. Todd attached the old lease to it, and said that the said lease having expired on the 1st day of May, 1866, the said John Boyd and George A. Arthurs became and were his tenants from year to year of the said property: that they had not, nor had either of them, given any notice to quit, nor had he given them such notice, whereby the said tenancy would be determined, other than a lease of said property made by him to said George A. Arthurs and John Smith referred to in his former affidavit.

Mr. Boyd, in referring to this in his affidavit, said that it was true, and that after the expiration of the said lease, on the 1st of May, he Mr. Boyd and the said George A. Arthurs became and were tenants thereof to Mr. Todd from year to year, and that he has not given any notice to quit the premises in said lease, nor received any such notice from the said Todd. Now it is on a tenancy still subsisting, as the defendant alleges, he claims now to be qualified.

Boyd and the relator were the only two candidates, and the former obtained the majority of the votes polled.

Votes were polled on both sides by electors who had not paid their taxes, and the defendant filed affidavits to shew that there had been some agreement between the candidates that the roll should be taken as it stood, to save any trouble on this head.

The following protest was handed by the relator to the returning officer, and was by him read to the electors present at the opening of the poll and before any vote was recorded for either candidate.

"Take notice that I protest against any votes being taken or recorded at this election for Mr. John Boyd, on the ground that he is not legally qualified according to the provisions of the Acts of Parliament in that behalf. He having no interest in the property assessed on Wellington Street in the names of John Boyd and George A. Arthurs, and the taxes on said property not having been paid.

And I hereby publicly notify the electors that they will be throwing away their votes if they are recorded for Mr. Boyd, and I request that you will inform the electors of this my protest.

"Wm. Adamson.

"Toronto, 6th January, 1868."

"The above protest was read by me at commencement of election.

"John Burns,

"*Returning Officer 1st Division.*"

A similar protest was addressed, to and stated in the same terms to have been read by Robert H. Trotter, Returning Officer, 2nd Division.

Copies of this protest were also shown to have been affixed in and about the polling booths in conspicuous places, but no notice appeared to have been given at the time of nomination, nor did the relator at that time contend that the defendant was disqualified, and that he was the only qualified candidate.

Harman for the relator.

1. The defendant was not qualified. He could only attempt to qualify on the property in St. David's Ward, which was clearly insufficient, and he had not "*at the time of the election*" the necessary freehold or leasehold required by sec. 70 of 29 & 30 Vic. cap. 51, having parted with all interest in the property on Wellington Street, and the former tenancy having been surrendered by operation of law.

2. The defendant was disqualified by not having paid *all* taxes due by him, pursuant to 29 & 30 Vic. cap. 52, sec. 78. These taxes should have been paid *at the time of the election*: *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N.S. 126; 1 L. C. G. 72.

And the election commences with the day of nomination, as is clear from the expressions used in the Act. Sec. 101 of 29 & 30 Vic. cap. 51, defines "the proceedings *at* such elections" (not *prior* to the election) to be, First, a day for nomination of candidates; Second, a declaration at such nomination, if no more candidates than offices are proposed, that such candidates have been "duly elected," and, Third, an adjournment, not another meeting, if there are more, and a poll is required. The case may be argued thus.—In one ward a candidate is elected on the first or nomination day by acclamation; in another ward a candidate is elected on the second or adjourned day by vote, both must have paid their taxes at the time of election, that is to say, at the time not only that they were, but could have been elected, and to decide otherwise would be to give two interpretations to the law, one to meet the case of the candidate elected by acclamation on the nomination day, and another to meet the case of the candidate who having opposition has to wait and stand a poll at the adjourned meeting when the same can be opened.*

3. The defendant had not a majority of qualified voters, inasmuch as the number already specified had not paid their taxes before 16th December preceding the election.

4. It is doubtful whether the relator can under all the circumstances claim the seat; but he is entitled to the costs of these proceedings.—*Reg. ex rel. Tinning* v. *Edgar*, 4 Prac. R. 86; 3 U. C. L. J. N.S. 39; *Reg. ex rel. Dexter* v. *Gowan*, 1 Prac. R. 104; *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N.S. 126; *Reg. ex rel. Blakely* v. *Canavan*, 1 U. C. L. J. N.S. 188; *Reg. ex rel. Hartrey* v. *Dickey*, 1 U. C. L. J. N.S. 190; *Reg. ex rel. Carroll* v. *Beckwith*, 1 Prac. R. 278.

Duggan, Q. C., and *Harrison*, Q. C., shewed cause.

1. The defendant claims to be qualified on a tenancy still subsisting as between him and the landlord. The dissolution between Boyd & Arthurs, as affecting their business transactions, would not divest Boyd of his rights as Todd's tenant. Whatever surrender there may have been of Arthur's moiety, there was none of Boyd's. There is no act of his from which an inference of a surrender by him could be shewn, except his leaving the occupation of the premises, and that really proves nothing; and no act of his former partner could bind him.—Woodfall L. & T. 272, *et seq.*; *Agard* v. *King*, Cro. Elis. 775; *Mackay* v. *Macreth*, 4 Dougl. 213; *Doe* v. *Ridout*, 5 Taunt. 519; *Mollett* v. *Brayne*, 2 Camp. 103; *Thomson* v. *Wilson*, 2 Starkie, 379; Shep. Touch 272; Arch. L. & T. 83; *Carpenter* v. *Hall*, 15 C.P. 90.

The roll is however conclusive as to property qualification (the language being even stronger in this respect with reference to candidates than voters, see secs. 70 and 75), and the Courts will as far as they can uphold the qualification in favor of the sitting member.—*Reg. ex rel. Blakely* v. *Cameron*, 1 U. C. L. J. N. S. 188; *Reg. ex rel. Chambers* v. *Allison*, *Ib.* 244; *Reg. ex rel. Ford* v. *Cottingham*, *Ib.* 214; *Reg. ex rel. Tilt* v. *Cheen*, 7 U. C. L. J. 99; *Reg. ex rel. Laughton* v. *Baby*, 2 U.C. Cham. R. 130.

2. There is no affirmative declaration that the candidate must have paid all his taxes before the election, only that non-payment disqualifies him from being a member, and he does not become a member of the Council until he takes the oath of office.

The defendant paid his taxes before the election, which commences not with the nomination but with the recording of the votes and the choice by the electors between two or more candidates.

It is sufficient in any case that he has paid his taxes in the ward in which he lived, otherwise it would follow that he must have paid his taxes in a different municipality, which the statute could not contemplate.

3. The names of the voters must be received as they appear on the lists, and there is no machinery to carry out the provision disqualifying voters who have not paid their taxes, and if a new election is ordered the same lists must be used.

The persons whose names appeared on the roll were accepted by both candidates as qualified voters so far as payment of taxes was concerned, and though an elector might not perhaps be bound by such an agreement, the candidate would: *Reg. ex rel. Charles* v. *Lewis*, 2 Cham. R. 171.

The roll is conclusive.—Sec. 101, ss. 5; *Dundas* v. *Niles*, 1 Cham. R. 198; *Reg. ex rel. Chambers* v. *Allison*, 1 U. C. L. J. N.S. 244.

More votes are however attacked by the defendant than by the relator on this ground, and a scrutiny must be had as to that.

* *The Queen* v. *Cowan*, 24 U. C. C. B. 606.—Eds. L. J.

4. The defendant should not be visited with costs if the election is simply set aside and a new election ordered, as the relator would then only succeed as to part. — *Reg. ex rel. Clark* v. *McMullen*, 9 U. C. Q. B. 467; *Essex Election Case*, 9 U. C. L. J. 247; *Reg. ex rel. Swan* v. *Rowat*, 13 U. C. Q. B. 340; *Reg. ex rel. Gordanier* v. *Perry*, 3 U. C. L. J. 90; *Queen* v. *Hiorns*, 7 Ad. & El., 960.

J. H. Cameron, Q. C., *Harman* with him, *contra*.

1. As to the question of the surrender, the same was completed in law, from the absolute abandonment of the premises by Boyd, and his removal to new premises with his new partner, any question of liability between Todd, the landlord, and himself as to a yearly or any other tenancy being absolutely concluded when Todd granted a new lease to Smith & Arthurs as the successors of Boyd & Arthurs. One test was, could Todd maintain an action for rent against Boyd after the granting such new lease, and could not Boyd set up such new lease as a conclusive answer and defence? Undoubtedly he could. *Nickells* v. *Atherstone*, 10 A. & E., N. S. 944, is a direct case on the point. Lord Denman, C. J., in this case says, "If the expression 'surrender by operation of law,' be properly 'applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing and which would not be valid if his particular estate had continued,' it appears to us to be properly applied to the present. As far as the plaintiff the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him and which is inconsistent with the continuance of the defendant's (the former lessees) term. As far as the new tenant is concerned the same is true. As far as the defendant, the owner of the partnership estate in question, is concerned, he has been an active party in the transaction, not merely by consenting to the creation of the said relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter."

2. *Reg. ex rel. Rollo* v. *Beard*, *ante*, is conclusive that the candidate must be qualified as a member at the time of the election, which it is clear commences with the nomination.

3. As to costs, *Reg. ex rel. Tinning* v. *Edgar*, *ante*, is almost exactly parrallel with this case as entitling the relator to costs.

The other grounds taken in moving the writ were also enlarged on.

John Wilson, J.—Assuming that there was a tenancy from year to year, was it not surrendered before the election, and on the 1st of August last, by operation of law and the acts of the defendant, on his own showing.

Boyd & Arthurs dissolved their partnership, when does not appear, but certainly before the 1st day of August last. Arthurs is left with the business and business premises. Boyd retires, pays no further rent, retains no further possession, and is so much a stranger that he swears he was no party to the lease to Smith & Arthurs, or ever heard of it till after the election. Is he, after all that has taken place, co-tenant with Arthurs in these premises? Can he now go to Arthurs and claim possession as his joint tenant? If he cannot, he is not *bona fide* possessed as tenant, so as to qualify him as Alderman under this Municipal Act.

On the reasoning in the case of *Nickells* v. *Atherstone*, 10 Q. B. N.S. 944, is the defendant not precluded from saying he is still co-tenant with Arthurs? Have not all parties estopped themselves from setting up the yearly tenancy now contended for? Todd cannot be allowed to say this yearly tenancy between Boyd & Arthurs exists, for he has made a lease under seal to Smith & Arthurs. Arthurs cannot say it subsists, for he is a party with Smith to the new lease. By operation of law as to these parties the tenancy from year to year has merged. Can Mr. Boyd claim that it is still existing? Can he go to his late partner and say I am joint-tenant with you? I think not; for on his own showing he left his partner Arthurs, and formed a co-partnership with Mr. Munroe in another place, as wholesale grocers. He left his partner to do as he pleased with the business and the warehouses in which it was carried on, and without doubt knew at least that Arthurs was carrying on the same business which he had left, with his new partner Smith. Has Boyd any more right to assert an interest in the warehouses than he has in the goods, which before his retirement had been the goods of Boyd & Arthurs?—See *Matthews* v. *Sawell*, 8 Taunt. 270; *Thomas* v. *Cook*, 2 B. & Al. 119; *Walker* v. *Richardson*, 2 M. & W. 882.

I think therefore the defendant was not at the time of the election the co-tenant of Arthurs, and without this he had not the property qualification to be chosen Alderman.

As to the second ground, that the defendant had not paid all his taxes before the election, it is admitted the defendant paid his taxes after the nomination and before the polling day; and the question is, when is the election?

The relator contends that it is the day of nomination; the defendant says it is the polling day.

That the day of nomination is the day of election seems clear. The polling day is but an adjournment of the election. The words of the act seem to put it beyond a doubt, for it declares that the proceedings at elections shall be—a nomination on the last Monday but one in December, when, if only one candidate, or one candidate for each office, be nominated, after an hour, he shall be declared elected; but if more, and a poll be demanded, then the Returning Officer shall adjourn the proceedings until the first Monday in January; but, by sec. 73, a candidate is disqualified who has not paid all taxes due by him.

To hold that the day of polling is the day of election would enable a candidate to offer himself who was disqualified, and who, if the only one, might be declared elected, contrary to the letter and spirit of the Act.

I think therefore that the day appointed for the nominaton is the day of election, and the disqualification of a candidate has reference to that day, in analogy to the holding of the learned judge in *Reg. ex rel. Rollo* v. *Beard*, and I think to hold otherwise would be at variance with the spirit of the Act.

The relator, in the first instance, claimed to be entitled to his seat; but this is not seriously urged, for he gave no notice on the day of nomination that the defendant was not qualified, or that he claimed to be elected as the sole candidate by reason of the non-qualification of Boyd. In *Reg. ex rel. Forward* v. *Detlor* (ante p.), I lately held that a candidate who claims to be elected by reason of the disqualification of his opponent must distinctly so claim it at the nomination, and at the poll give notice that the electors are throwing away their votes; and he cannot be declared entitled to the seat if his conduct be equivocal, so as to mislead the electors. He cannot go to the polls, taking his chance of election, after deterring voters, and then fall back and claim his seat on grounds which by his going to the polls he has waived.

I therefore adjudge the election of John Boyd, as one of the Aldermen of St. David's Ward, in the City of Toronto, to be invalid; and I direct a writ to be issued according to the statute, to remove the said John Boyd from such office; and I further direct that a writ be issued for the purpose of a new election being held for the election of an Alderman for St. David's Ward, in the room of the said John Boyd.

I also direct that Mr. Boyd shall pay the costs of these proceedings, so far as they relate to the invalidity of his election for want of a property qualification.

Reg. ex rel. Bugg and Moulds v. Bell.

Contested Election—Election by acclamation—29 & 30 Vic. cap. 51, sec. 130.

Where a candidate is declared elected on the nomination day, as being the only candidate proposed, his election cannot be questioned on a *quo warranto* summons under above act there being no other "candidate at the election or any elector who gave or tendered his vote thereat" who could by law be a relator.

[Common Law Chambers, March 14, 1868.]

This was a writ of summons in the nature of a *quo warranto* to set aside the election of the defendant, who was elected as one of the aldermen for St. Andrew's Ward, in the city of Toronto, at the municipal election on 23rd December, 1867.

The defendant was the only candidate proposed and seconded at the nomination; and was declared duly elected, pursuant to sec. 101, ss 3, of the Municipal Act.

The statement of the relator complained of the usurpation of the office by defendant, and stated, in effect:—That the said Robert Bell was not duly elected, and usurped the office of Alderman of St. Andrew's Ward on pretence of an election held on Monday, 23rd December, 1867; that relators had an interest in said election, as electors of said ward and of other wards, the relator, John Bugg, being an elector who gave his vote at the last annual election for aldermen in said city; when the said Robert Bell was declared elected as such alderman, and the relator, W. Moulds, being a duly qualified elector, present at and who in so far as his vote could be tendered or taken, voted or tendered his vote at the nomination or election of said Robert Bell; and they shewed the following causes why the election should be declared invalid:

1. That the election was not conducted according to law, in this, that at the annual meeting for nomination, &c., held in Ward of St. Andrew, at noon (or thereabouts) on Monday, the 23rd December last, the Returning Officer having called upon the electors there present to nominate a fit and proper person, &c., the said Robert Bell was proposed and seconded; but that the Returning Officer, without waiting the time required by law to allow other nominations to be made, closed the said meeting of electors before the expiration of one hour from the opening, &c., and declared said Bell duly elected.

2. That said Bell, neither when he was so elected or when he accepted office, had the necessary property qualification as a freeholder or leaseholder.

3. That said Bell had not at the time of election and acceptance of office, in his own right or right of his wife, &c., a legal or equitable freehold or leasehold, rated in his own name on the last revised assessment roll, to the amount of at least $4,000 freehold or $8,000 leasehold, as required, &c.

4. That said Bell had mortgaged his interest in the property on which he qualified for the sum of $3,179, to the Canada Permanent Building Society, as appeared in the registry office, and that said mortgage was not discharged.

5. That said Bell qualified on property partly freehold and partly leasehold, rated as follows: leasehold $7.466, freehold $800, while the incumbrances amounted to $3,179.

J. H Cameron, Q. C. (*Harman* with him) showed cause.

1. The election cannot be inquired into under the 130th section of the Municipal Act. The act requires that the relator should be a person who was either a candidate, or an elector who voted or tendered his vote at the election of the alderman complained against; and as the party here sought to be unseated had been elected by acclamation and without a contest, the relators could not be, and in fact were not, entitled to the writ, they being neither candidates nor electors who voted or tendered their votes. This point has, however, been already settled in favor of this contention by *Reg. ex rel. Smith* v. *Roach*, 18 U. C. Q. B. 226, and *In re Kelly* v. *Macarow*, 14 U. C. C. P. 457.

2. The statement that the poll was not kept open for the hour, required by the act, was based upon the affidavit of the relator Moulds, uncorroborated by other evidence. But this was met by positive affidavits by the Returning Officers, contradicting his assertion, who swore that the proceedings commenced at noon precisely, and were not closed until after one o'clock, and by other persons in corroboration.

3. The relators are not in any event qualified as such to be heard, not having paid the taxes due by them on the 16th day of December, as required by section 73, in support of which sundry affidavits were filed by the collectors of the several wards in which they were in such default.

4. As to the property qualification of the defendant, affidavits were filed from the city clerk, and the Secretary of the Building Society, as to the property on which the defendant qualified and the mortgage thereon, shewing that the former was under and the latter overstated, and on which it was argued that the defendant was amply qualified; and further, that there was

nothing in the act which required the property on which a civic qualification is based to be unincumbered, all that was required was that he should be assessed for and pay taxes for property worth $4,000 freehold or $8,000 leasehold.

Hodgins for the relators.

The words "elector who voted or tendered his vote at the election," should be interpreted as meaning, at the annual election of aldermen within the municipality.

The interpretation contended for by the defendant would leave no redress in cases where a candidate is elected by acclamation; and that part of the statute which requires a property qualification might in such case be evaded.

Hagarty, J.—This case seems to me to be governed by *In re Kelly* v. *Macarow*, and I shall decide it against the relators upon the authority of that case. If the electors do not think it worth while to contest an election in the ordinary way, it may properly be considered that the Legislature did not mean to give them a right to contest it by an application of this kind. As to the point raised, that the proceedings at the nomination were not kept open for a full hour, the objection is most loosely made and is amply contradicted.

Summons discharged with costs.

Reg. ex rel. Boyes v. Detlor.

29, 30 *Vic. cap.* 51, *sec.* 73—*Disqualification of candidate*

Held, that a County Clerk is disqualified under sec. 73 of 29 & 30 Vic. ch. 51, from sitting as mayor of the same or any other municipality.

[Chambers, January 23, 1868.]

This was a *quo warranto* summons to set aside the election of the defendant, who claimed to have been duly elected mayor of the Town of Napanee.

The defendant was clerk of the municipality of the United Counties of Lennox and Addington at the time of his alleged election as mayor, and it was contended that being such clerk he could not legally take a seat as mayor of that or any other municipality, being disqualified under sec. 73 of 29 & 30 Vic. cap. 51.

C. W. Paterson shewed cause. The disqualification only applies where the same person attempts to fill both offices in the same municipality; and the former act (22 Vic. ch. 57, sec. 73), still in force in this particular by virtue of sec. 428 of 29 & 30 Vic. cap. 51, and the defendant would not have been disqualified under the former act.

Moss contra. The disqualification is general, and the statute is clear on the point, and differs from the former act, for here all the officers who are disqualified for election are particularised. The reason of the statute is obvious, for there might be disputes between the different municipalities which would render the holding of these offices by the same person incompatible. There was a mischief under the former act which this is intended to remedy.

John Wilson, J.—The question is, whether by the 73rd section of 29 & 30 Vic. cap. 51, the defendant is disqualified as a member of the municipal corporation of Napanee. The words of that section, as regards this defendant, are, "no clerk of any municipality shall be qualified to be a member of the council of any municipal corporation."

The words of the old statute, Con. Stat. U. C. cap. 54, sec. 73, are, "no officer of any municipality shall be qualified to be a member of the council of the corporation." The defendant contends that he was not disqualified under the former act, and the new act is to be construed as the old one.

If this case had occurred under the old act I should have held this defendant disqualified, for the language seemed very clear, that no officer of any municipality shall be qualified to be a member of the council of the particular corporation.

But under the last act no clerk of any municipality shall be qualfied to be a member of the council of *any* municipal corporation. The evident intention of the legislature was, among other things, to exclude persons who might be placed in a false position, by reason of holding two offices; and no man should, if it can be avoided, be placed in a false position.

It requires no great foresight to see that a man, being a subordinate in the municipal corporation of a county, and the head of the corporation of a town or city in that county, would have conflicting duties to perform, and would represent conflicting interests if he held these offices. To allow the defendant to be mayor while he held the office of clerk of the municipality of the county, would be contrary to the express words of the statute, and at variance with its spirit.

The office is adjudged vacant, and there will be a new election with costs to the relator.

Reg. ex rel. Forward v. Detlor.

Municipal election—Notice to electors of disqualification of a candidate.

Held, 1. When voters perversely throw away their votes the minority candidate has a right to the seat.

2. When a candidate claims the right to be elected at the nomination owing to his opponent's disqualification, his going to the polls waives such right.

3. A candidate should, under such circumstances, beside claiming the seat at the nomination, also notify the electors at the polls that they are throwing away their votes by voting for the disqualified candidate.

[Chambers, January 25, 1868.]

This was a *quo warranto* summons similar to the last, but it was further contended by the relator, who had been an opposing candidate, that he was entitled to the seat instead of the defendant. The question of his disqualification was admitted to have been established by the decision in the case above reported; and the arguments of counsel were directed to the question whether the relator was entitled to the seat.

Holmested for the relator. The objection was clear on the face of the statute, and as there was therefore no other qualified candidate than the relator before the electors, it was unnecessary for him to give any notice to electors at the polls,—electors could not then nominate another candidate.

There was collusion on the part of Boyes, the former relator, and the defendant, and therefore the judgment in his case was no bar to

this application, and Boyes was not qualified as a relator in that case, having voted at the election for one Williams, who was not in fact a candidate and had not gone to the polls.

He cited *Reg. ex rel. Metcalfe* v. *Smart*, 10 U. C. Q. B. 89; *Reg. ex rel. Tinning* v. *Edgar*, 8 U. C. L. J., N. S., 89; *Reg. ex rel. Richmond* v. *Teggart*, 7 U. C. L. J. 128; *Reg. ex rel. Dexter* v. *Gowan*, 1 Prac. Rep. 104.

McKenzie, Q. C., *contra*.

J. Wilson, J.—I think Boyes was qualified as a relator under the statute.

If voters perversely throw away votes the minority candidate has a right to his seat, but the facts here do not shew that they did, as the electors might reasonably have thought that all the candidates were qualified. The relator should have gone further and told the electors at the polls that defendant was not qualified, and warned them not to vote for him.

The candidate with the largest number of votes should of course be elected, if possible, and, under all the circumstances, I do not think the relator should have the seat, for he waived his first protest by going to the polls. If a candidate claims to stand on his rights he must do so, and not waive them by afterwards going to the polls. He must elect his position and stand by it.

It was not suggested in the first case that there was another case pending on precisely the same grounds, or they would have been both disposed of at the same time, but the judgment in both will be the same.

As to costs, I do not think the first application was, so far as Detlor was concerned, collusive, and if not he should not be visited with costs of both applications. In this case each party must pay his own costs.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

Brand v. Bickell.

Insolvent Acts of 1864 *and* 1865—*Sale of goods—Interpleader.*

When a sale has been had under an execution against a judgment debtor, who after the sale makes an assignment in insolvency, the proceeds of the sale are not vested in the official assignee, but go to the judgment creditors. A Sheriff has a right to an interpleader in such a case, where proceeds claimed by the official assignee.

[Chambers, January 15, 1868.]

On the 30th December last, the Sheriff of the United Counties of Northumberland and Durham obtained from the Chief Justice of the Common Pleas an interpleader summons, calling upon the plaintiff (the execution creditor) and one Robert Elias Sculthorp, the claimant of the proceeds of the sale had under a writ of *fi. fa.* issued herein, to appear and show cause why they should not maintain or relinquish their respective claims.

The summons was returnable on 3rd January, when it was enlarged till the 8th January, on which day the Sheriff filed an additional affidavit showing that, since the service of the summons, the defendant (the execution debtor) had made a voluntary assignment to one E. A. McNaughton, an official assignee, at Cobourg under the Insolvent Act of 1864; and that he (the sheriff) had been served with a notice of claim by or on behalf of the official assignee, who also claimed the proceeds of the sale; upon which Mr. Justice Morrison, then presiding in Chambers, enlarged the summons for a week, at the same time ordering notice of the enlargement to be served on the official assignee, to enable him to appear and sustain or relinquish his claim, which was accordingly done.

On the 15th January, the summons again came up for argument before Mr. Justice Adam Wilson, when it was agreed between the parties that his Lordship should dispose of the claims summarily, and not order an issue. It appeared, from the affidavits filed by the Sheriff, in addition to the above facts, that the sale under the writ of *fi. fa.* herein had taken place on the day of December last; and that he realized thereon the sum of $280. That on the day of December, the day before the sale, a writ of *fi. fa.* (goods) against the same defendant, at the suit of the said Sculthorp, the claimant herein, had been placed in his hands; and that the said Sculthorp had, since the sale, served him with a notice that he claimed the proceeds of the said sale under his execution, on the ground that the judgment on which plaintiff's execution was issued had been released.

——— appeared for the claimant Sculthorp, and filed a verified copy of a release executed in 1865, by the plaintiff and others, releasing the defendant from all claims whatsoever that they or any of them had against him (the defendant), and contended that if the judgment was a good and valid release, the plaintiff was not entitled to issue execution upon it, or to take any steps whatever to enforce it, and that therefore the claimant was as against the plaintiff entitled to have the proceeds of the sale applied in his execution, which was not in any way impeached.

Then as to the claim of the official assignee, he referred to the Insolvent Act of 1864, sub-sec. 7 of sec. 2, and sub-sec. 22 of sec. 3, and to the sections 12 & 13 of the Act of 1865, amending the same; and contended that under sec. 12, as a sale of the goods had actually taken place under an execution, the proceeds thereof were not vested in the official assignee by virtue of the assignment, as it had been made subsequent thereto, and that therefore the official assignee was not entitled to the proceeds; and in support of this contention cited, in addition to the above mentioned acts, *Converse* v. *Michie*, 16 U C. C.P. 167, and *White* v. *Treadwell*, 17 U. C. C. P. 487.

A. H. Meyers for execution creditor. The proceeds of the sale are claimed by the official assignee, under the Insolvent Act of 1864, and the Sheriff has no right to make this application. The act of 1865 respecting interpleading does not apply to such a case as this. The release had never been acted upon or considered as releasing the judgment by the plaintiff.

Donald Bethune, for the official assignee. The Sheriff is not properly in court, and the official assignee is entitled to receive the proceeds of the sale; all the assets of the insolvent, of every kind and description, are vested in the assignee, and section 12 of the Act of 1865 does not exempt the money in dispute herein, even although the

sale had taken place before the assignment; and at all events the claimant is not entitled to it, as it had not been made under his execution; and if the plaintiff is not entitled to it under his execution, it must go to the assignee.

Adam Wilson, J.—I must overrule the objection taken that the Sheriff is not properly before me, or entitled to make this application. This is one of the cases to which the Act of 1865, amending the Interpleading Act, was intended to apply.

In the face of the release filed by the claimant, I cannot see what right the plaintiff has to claim the money at all. He has released his judgment, and there is therefore nothing due upon it. The claimant's execution was in the Sheriff's hands before the sale took place, and I think he is entitled to have the proceeds of the sale applied on it.

I also think that he is entitled to it as against the official assignee; for section 12 of the Act of 1865 says that "the operation of the 7th sub-section of section 2, and of the 22nd sub-section of section 3, of the Act of 1864, shall extend to all the assets of the insolvent of every kind and description, although they are actually under seizure, under any ordinary writ of attachment, or under any writ of execution, so long as they are *not actually sold* by the sheriff or sheriff's officer, under such writ." In this case the goods were *actually sold*, and therefore I think the official assignee is not entitled to the proceeds. I will therefore order that the plaintiff and the official assignee be barred from all claim thereto, that the sheriff do pay over the proceeds to the claimant Sculthorp, and that the plaintiff do pay to the sheriff, claimant and official assignee, their costs of this application.

Order accordingly.

James v. Jones.

The fees on a reference to a County Judge from the Superior Court, such as an examination of a judgment debtor, must be paid in the proper stamps and not in cash.

[Chambers, Jan. 24, 25, 1868.]

S. M. Jarvis moved absolute a summons to commit defendant for unsatisfactory answers, on an examination before the County Judge of Leeds and Grenville. He filed the examination and judge's certificate.

Osler objected that the examination was not stamped with the stamp required by Con. Stat. U. C. cap. 15 (County Courts Acts), which states in what manner and to whom the fees of the judge should be applied. He referred to a case of *Waddell* v. *Anglin*, noted in 3 U. C. L. J., N. S., 141, in which Mr. Justice Adam Wilson held, "that deputy clerks of the Crown had no right to retain the fees for examination to his own use, because he is not specially authorised to do so, and that the examination taken must bear the necessary stamps for the necessary amount, chargeable for the same under the statute."

John Wilson, J., upheld the objection, and discharged the summons with costs.

Summons discharged with costs.

NOTES OF CASES UNDER ACT FOR QUIETING TITLES.

(*Before* R. J. Turner, Esq., *Referee of Titles*)

Re Gordon.

Defective materials—Title by possession—Search for, and evidence as to missing deeds—Certificate subject to dowers—Notice to parties interested—Mutual Insurance Companies' policies.

The following statement of the defects appearing in the petitioner's case was transmitted to his solicitor by Mr. Turner:

The most important part of this title is that which precedes the conveyance, "Forsyth to Peters," and this appears to be the "gap" which has chiefly occasioned the petition, yet it is that part which as far as can be judged from the papers has received the least attention, indeed there has hardly been an attempt to meet the difficulty which it presents.

1. As to a title by possession, the only evidence is that W. was once in possession; thedate is not given, and not a word is to be found as to the possession since that time.

It may be observed that twenty years possession is not sufficient unless it is shewn that the circumstances are such as to bar the persons, who but for such possession would be the owners. But here there is no evidence whatever as to who these persons were when this possession commenced or since. Were they *sui juris*, and in the country? Did they know of the possession? Did time commence to run against them?

2. Then as to the paper title. It does not appear that any search whatever has been made for the missing deeds. At least as much evidence as is necessary to let in secondary evidence at law is necessary under this act, a certificate under the act having a much greater effect than a judgment at law. But there is no evidence whatever, not a tittle, that there ever was a deed from the patentees to any one, or from any one to Mr. Forsyth.

Why has no application been made to him or his attorney, as to how he came to execute a conveyance? what title he had? from whom he got it? whether the title was looked into on his behalf before he purchased, if he did purchase, and with what results? what deeds, if any, he got, and what has become of them? when he had them last, or what is the last information he had about them?

3. His grantee, Peters, has made an affidavit but it contains not a single word on this subject, and the same enquiries should have been made of him as have been suggested in regard to Forsyth.

4. And so with every subsequent owner and mortgagee. For all that appears, every one searched, and either personally or by his attorney or agent knows the particulars of the title. And every owner and mortgagee, before those now interested, may have had the missing title deeds, and one or other of them may have the deeds now, if they ever existed. It is incredible that a valuable property should have passed through so many hands without any investigation of the title or reference to deeds antecedent to the deed to Peters.

5. It does not appear that any enquiry has been made for the patentees or their family. Some of them might know whether the property had been conveyed, and to whom, for all the papers show that the family may be well known and easily to be seen. If not, what search has been made for them? Sometimes a clue to parties is obtained by searching for their wills. Has this been done?

6. If the title is cleared of the other difficulties the certificate can only be granted subject to the dower, if any, of the wives of all these former owners, and of ——, unless the petitioner considers it worth while making further enquiries to ascertain the facts as to whether the wives are alive or not.

7. Notice of the application for the certificate should be given to M. and W., to whom deeds are registered, though no right of the grantor to convey to them at present appears. Copies too of the memorials of deeds to them, and of the deed to S. and others, must, by the express terms of the statute, be produced, as the petitioner has not the original deeds.

8. No certificate by the sheriff that he has not sold the property under execution has been produced.

9. Two Mutual Insurance policies are produced, but there should be some evidence that they are the only ones under which there would be a lien on the property.

10. There is no proof of payment of taxes for 1866 and 1867.

ENGLISH REPORTS.

CROWN CASES RESERVED.

REG. v. GEORGE BULLOCK.

Malicious injury to cattle—24 & 25 Vic. c. 97, sec. 40—Proof of wounding—Instrument.

It is not necessary in order to prove a wounding within 24 & 25 Vic. cap. 97, sec. 40. to show that injury done to the cattle has been caused by any instrument other than the hand of the prisoner.

[C. C. R., Jan, 25,—16 W. R, 405.]

Case reserved by the chairman of the Quarter Sessions for the County of Gloucester.

George Bullock was tried before me on an indictment which charged him with maliciously and feloniously wounding a gelding, the property of James Ricketts. The prisoner pleaded not guilty.

On the trial it was proved that the prisoner, who was sent by his master with a cart and horse to fetch stone from a distant field on the 20th of December last, at half-past one p.m., returned about four p.m., bringing back the horse with his tongue protruding seven or eight inches, and unable to draw it back into his mouth. The veterinary surgeon who examined the horse the following day proved that he found the roots and lower part of the tongue much lacerated, and the mouth torn and clogged with clotted blood; the injury he considered might have been done by a violent pull of the tongue on one side. He was obliged to amputate five inches of the tongue and the horse is likely to recover. The prisoner's statement was that the horse bit at him and he did it in a passion. There was no evidence to show that any instrument beyond the hands had been used. The prisoner's counsel contended that no instrument having been proved to be used in inflicting the injury, the prisoner could not be convicted under the 24 & 25 Vic. cap. 97, sec. 40. For the prosecution it was maintained that under the statute it was not necessary to show that the injury had been caused by any instrument other than the hand or hands of the prisoner. The prisoner's counsel, on the point being reserved, declined to address the jury, and a verdict of guilty was found by them.

I respited the judgment and liberated the prisoner on recognisance, in order that the opinions of the justices of either bench and the Barons of the Exchequer might be taken on the question—whether the prisoner was properly convicted of the wounding, there being no evidence to show that he used any instrument other than his hand or hands?

No counsel appeared for the prisoner.

Sawyer for the prosecution.—This was a wounding within the meaning of 24 & 25 Vic. cap. 97, sec. 40. COCKBURN, C. J.—This indictment was simply for wounding?] Yes. There was no count for maiming, as there is authority that such a count could not be sustained where there is no evidence of a permanent injury: *Reg.* v. *Jeans*, 1 C. & K. 539. That case was upon statute 7 & 8 Geo. 4, cap. 30, sec. 16, which in terms is substantially the same as the present section; but it is no authority that such an injury as this is not wounding. There the point seems not to have been argued by the counsel for the prosecution, and the decision only goes to show this injury would not be a maiming: *Reg.* v. *Owens*, 1 M. C. C. 205; and *Reg.* v. *Hughes*, 2 C. & P. 420, are there cited by the counsel for the prisoner to show that an instrument is necessary to constitute a wounding; but the former case only shows that pouring acid into the ear of a mare by which her sight was destroyed is a maiming; and in the latter case, biting off the end of a person's nose was held not a wounding within 9 Geo. 4, cap. 31, sec. 12, where the words are "stab, cut or wound any person." In *Jenning's case*, 2 Lewin's C. C. 130, where the prisoner with his teeth bit off the prepuce of a child three years old, it was held not a wound within 1 Vic. cap. 85, sec. 4; but there also the words of the Act are "stab, cut, or wound," and very different from those of the section on which this indictment is framed.

COCKBURN, C. J.— You have satisfactorily accounted for the decisions referred to; but no difficulty exists in the present case as this statute makes it felony, unlawfully and maliciously to "kill, maim, or wound" any cattle, and we may interpret the word "wound" in its ordinary acceptation, which means any laceration which breaks the continuity of the internal skin. It may not manifest so much malice on the part of a man if, in his passion, he uses his fist only; but it is within the words of the statute, and it is probable that in altering the words of this statute the Legislature may have intended to get rid of the difficulty.

The rest of the Court concurred.

Conviction affirmed.

QUEEN'S BENCH.

Weekes v. Wray.

Practice—Order to proceed—"Three days after service"—How time to be reckoned—C. L. P. Act, 1852, *sec.* 17.

A plaintiff obtained an order to proceed "three days after service of a copy of the order at defendant's residence, as if personal service of the writ of summons had been effected upon the defendant," and signed judgment on the third day.

Held, that this was irregular, as the order must be taken to give the defendant three days in which to appear.

[Q. B. Jan. 27,—16 W. R. 399.]

This was an application for a rule calling on the defendant to shew cause why an order setting aside proceeding herein for irregularity should not be set aside.

The facts appeared to be that the plaintiff applied on the 18th December at judge's chambers and obtained an order under section 17 of the Common Law Procedure Act, 1852, "that three days after service of a copy of this order at defendant's residence, the plaintiff be at liberty to proceed in this action as if personal service of the writ of summons had been effected upon the defendant."

A copy of this order was left at the residence of the defendant on Friday, the 20th December, and on the Monday following the plaintiff's attorney signed judgment in default of appearance. Later in the day the defendant entered an appearance and applied to a master for and obtained an order to set aside the judgment signed in the cause, writ of *fi. fa.*, and any other writ or writs for irregularity. This order was confirmed by a judge on appeal from the master's decision.

J. O. Griffiths for the plaintiff, now applied for a rule *nisi* to set aside this latter order. He contended that the first order was a permission to the plaintiff to proceed on the third day after service of the copy at the defendant's residence, and that, therefore, the judgment signed on the Monday was regular, and ought not to have been set aside.

F. Brandt appeared to shew cause in the first instance, but was not called on.

The Court were of opinion that the three days after the service of the order were given to the defendant in which to appear, so that the plaintiff could not sign judgment until the expiration of the time mentioned, and they accordingly refused the rule.

Rule refused.

COMMON PLEAS.

Culverhouse v. Wickens.

Garnishee—Payment into court on judge's order—Lien—17 & 18 *Vic. cap.* 125, *s.* 63, 65—12 & 13 *Vic. cap.* 106, *s.* 184.

A judgment creditor obtained a garnishee order to attach a debt owing to the judgment debtor for work done by him as a solicitor. The garnishee disputed the amount of the debt as being excessive, and a judge allowed him further time to tax it, on his paying £25 into court. The debt was taxed at £27 10s. The day after the £25 was paid into court, the judgment debtor registered a composition deed under the Bankrupt Act, 1861, of which the garnishee subsequently had notice.

Held, that the effect of the payment into court under the judge's order was the same as that of payment under the 63rd section of the Common Law Procedure Act, 1854, and was a discharge to the garnishee as against the judgment debtor.

Held also, that the judgment creditor had a lien on the money paid into court under the 184th section of the Bankruptcy Act, 1849.

[C. P. Jan. 17,—16 W. R. 402.]

Lumley Smith moved, on the part of the garnishee, for a rule calling on the plaintiff, the judgment creditor, to shew cause why the garnishee order should not be rescinded, and all proceedings taken thereon stayed, and why the garnishee should not take out the sum of £25 which he had paid into court, on the ground that since the order the judgment debtor had executed a composition deed. The affidavits shewed the following facts:—The plaintiff, Culverhouse, had formerly been clerk to the defendant Wickens, an attorney; and Clark, the garnishee, was indebted to Wickens in a bill of costs arising out of certain Chancery proceedings conducted for him by Wickens as his solicitor; but this debt was disputed by Clark, on the ground of the unreasonableness of the amount. Judgment having been obtained by Culverhouse against Wickens for £72 12s. 4d., and remaining unsatisfied, Smith, J., on the 7th December last, made a garnishee order, attaching the debt from Clark to Wickens, or so much thereof as should be sufficient to satisfy Culverhouse after the bill had been taxed. On the 23rd December, Byles, J., made an order on the payment into court by Clark of £25, extending the time for taxation by fourteen days. The bill of costs when taxed amounted to £27 10s., more than one-sixth having been struck off. On the 26th December Wickens executed a deed of composition with his creditors under the 192nd section of the Bankruptcy Act, 1861. By this deed all his creditors granted him to the 31st December, 1868, to pay their respective claims in full. There was no *cessio bonorum*, but the deed was made pleadable in bar as a release, and contained a reservation of securities; and he obtained a certificate of discharge and registration thereunder. The £25 was paid into court on the 30th December, and the deed was registered on the 31st. On the 2nd January an order was made allowing Clark to set off the costs of the taxation, and on the same day Wickens served Clark with notice of the composition deed, and that he was to pay him and not the judgment creditor. The following cases were cited:—*Murray* v. *Arnold*, 8 B. & Sm. 287; *Wood* v. *Dunn*, 14 W. R. 84, 1 L. R. Q. B. 77; and in Error, 2 L. R. Q. B. 73, 15 W. R. 184.

Bovill, C. J.—As regards the application relating to £25, I think there is no ground for the interference of the Court. Under the 63rd section of the Common Law Procedure Act, 1854, money owing by the garnishee to the judgment debtor must be paid into court, or a judge may order execution to issue to levy the amount, and the effect of that provision and of the language of the 65th section, is, that such a payment or execution is a valid discharge to the garnishee against the judgment debtor. The fact that here payment had been made by order of a judge makes no difference. Then on taxation the debt was reduced to £27 10s.; but the result is that there was a valid payment so far as the garnishee is concerned of the £25, and within the meaning of the Act of Parliament; and if so there is no ground for the application as regards that sum. But, further, there would be a lien of the judg-

ment-creditor on it within the 184th section of the Bankrupt Law Consolidation Act, 12 & 13 Vic. cap. 106; and on that ground also there is no case for our interference; besides, there is an express reservation in the deed of collateral securities. As to the £2 10s. the parties, if well advised, will not give rise to any application to the Court about that, as considerable costs would be incurred both here and in the Bankruptcy Court; but if necessary the application on that may be renewed.

Willes, J.—I am of the same opinion. In *Murray* v. *Arnold*, the money was paid into court as a condition of the defendant's being allowed to issue a commission to examine witnesses abroad, and it was held that the plaintiff's right to the money was not taken away by the 184th section of the Bankruptcy Act, 1849; and that conclusion might have been arrived at on the Act itself without respect to lien. Wightman, J, there referred to *Ferrall* v. *Alexander*, 1 Dowl. P. C. 132, to show that money paid into Court to abide the event of a suit was not payment to a creditor within 6 Geo. 4, cap. 16, sec. 82; but I do not find that he expressed any opinion on the applicability of that to the Common Law Procedure Act, and I think it is not applicable to the 65th section of the Act of 1854. I should have thought "payment" there must apply to all payments, whether made under the 63rd section or under the order of a judge. Payment into court under such an order as the present is not a payment of money to be held for a creditor if he proves his claim a just one, but a payment of money to be held for the creditor till the amount of the debt is settled by taxing it, and that in effect is a payment to him, and by it the right of the creditor is determined as much as if the payment were made into his hands or into the hands of the sheriff under the execution. If it is said the creditor may not establish his claim, that fails here, because, *ex hypothesi*, he has a judgment. Our decision ought to be with reference to the right when the money was paid in, and then it could not be withdrawn from the creditor.

Keating and Montague Smith, JJ., concurred.

Rule refused.

Clarke et al. v. The Tyne Commissioners.

Practice—Costs—Change of venue—Undertaking where no order drawn up.

A summons to change the venue from London to Northumberland was indorsed by the judge "No order—the plaintiff undertaking to tax his costs, if successful, as if the cause had been tried in Northumberland." The cause occupied two days in trying at the Guildhall, after having been four days previously in the paper. The plaintiff having obtained a verdict, the master taxed on the principle that the cause would have taken only two days at Newcastle; he also disallowed the travelling expenses of witnesses from Strood to Newcastle, who lived near Newcastle, but at the time of the trial were actually at Strood; and compensation for detention of seafaring witnesses on shore.

Held, that the undertaking was binding, though no order had been drawn up; and that the principle on which the master taxed the costs and the claims he disallowed were within his discretion: and

Per Montague Smith, the principle of taxation was right.

[C. P. Jan. 22.—16 W. R. 480.]

Rule calling on the defendants to show cause why the master should not be at liberty to review his taxation of the plaintiff's costs.

The action was brought to recover damages from the defendants for injury caused by a collision in the river Tyne, at Newcastle, and the plaintiffs laid the venue in London After notice of trial, the defendants took out a summons to change the venue to Northumberland, principally on the ground that most of the witnesses resided at North and South Shields, in the neighbourhood of Newcastle. The summons was heard before Keating, J., by adjournment, on the 8th of February, 1867, when his Lordship made upon it the following indorsement:—"No order—the plaintiffs undertaking to tax their costs, if successful, as if the cause had been tried in Northumberland." The cause was in the paper at the Guildhall sittings, on the 1st, 2nd, 3rd, 4th, 5th and 6th of July; the trial lasted during the 5th and 6th, and ended in a verdict for the plaintiffs for £354 12s. 11d., the amount of their claim. Subsequently the taxation was begun, and pending it the plaintiffs twice took out a summons to show cause why the master should not tax in a different way; these summonses were, however, dismissed by Keating, J., and the case was referred to the court by the present rule.

The items in the plaintiff's costs disallowed by the master were as follows:—the expenses and loss of time of the plaintiff's attorneys, and witnesses for the days during which the cause was in the paper, over and above the two days actually employed in trying it. The expenses of witnesses who, though resident at South Shields, were at the actual time of the trial elsewhere; and compensation to seamen for engagements given up in consequence of their being subpœnaed to attend at the Guildhall, and for detention on shore. Two of the witnesses, though resident at South Shields, were at the time of the trial at Strood, in Kent, and the master disallowed a claim for their travelling expenses from Strood to Newcastle.

T. Jones, Q. C., and *Gainsford Bruce* showed cause, and contended that the undertaking indorsed by the judge on the back of the summons was binding on both parties, and that it was not necessary to draw it up and serve it, because, as there was "no order," there was nothing to draw up. The master was right in taxing on the supposition that the cause had been actually tried at Newcastle at the Spring Assizes, at which there were only two working days to dispose of the cause list; consequently it would have been wrong to take into consideration the days during which the cause was in the list at Guildhal before the trial.

Giffard, Q. C., and *Rew*, in support of the rule. There was no such undertaking given; but to avail themselves of it the defendants should have drawn up the order and served it: *Joddrell* v. ——, 4 Taunt. 253; *Wilson* v. *Hunt*, 1 Chitty's Rep. 647. But assuming the undertaking to be binding, the master taxed on a wrong principle. He only allowed two days' expenses, because the Newcastle assizes only lasted that time. But he ought not to have entered on any such speculation, for the undertaking was meant to apply only to the geographical difference between the two places, and not to the ordinary incidents of the cause. In the case of the witnesses who came from Strood, but

were properly resident at Shields, he disallowed their travelling expenses altogether, whether from Strood to Newcastle, or from Strood to London; and he disallowed all claims for detention because it was not proved to his satisfaction that there would have been any detention at all if the trial had been at Newcastle.

Bovill, C. J.—As to whether the undertaking in question was given, the affidavits are rather contradictory; but it was made by the judge in the presence of the parties, and it was their duty to see what was written. The only safe guide for us is the judge's indorsement, and therefore we hold there was such an undertaking given. Was it, then, necessary that the undertaking should be embodied in an order? It is necessary if it is to be used as an order; but that was not the case here, and therefore it was not necessary to give validity to the undertaking, and it was binding on both parties. Then three objections were made with reference to the taxation; and, first, it was said that the master only allowed the expenses of the witnesses for two days in London, though the cause was in the paper six days. I think it was a question for the master whether the witnesses had been detained longer in London than they would have been in Newcastle. It was a matter for his discretion on the facts before him on both sides; and the objection must be made out very clearly that he exercised that discretion wrongly before we interfere; and that was not done. Then the second objection to the taxation was that the master refused to allow the travelling expenses of witnesses from Strood to Newcastle. In fact, they only incurred the expense of travelling from Strood to London. The answer to the objection is, that the witnesses did not go to Newcastle, and the expenses were not incurred. The third objection relating to the taxation was the disallowance of of the detention money. It was a question for the master whether, if the trial had taken place at Newcastle, there would have been any such detention. Some one must determine the question, and it is essentially one for the master; and on that point also it is not shown that he was clearly wrong. The rule must therefore be discharged.

Willes, J.—I am of the same opinion. I think there was an undertaking, and I have heard Lord Truro say that the attorneys should not be bound by such an undertaking made in the course of the cause, unless it is in writing. Here it was in writing, and was put into writing by the judge, who represents the Court. For the rest, the appeal is against the discretion of the master, and we should be very careful how we interfere, unless we can say that such and such an item is wrong, and we cannot go into every item.

Montague Smith, J.—I am of the same opinion. It is said that the master took into consideration the time that would have been occupied in trying the cause at Newcastle, and that only, and that he should not have done so. But I think he was right, for he followed the very words of the order, and he must go into probabilities. I cannot see that he did anything wrong.

Keating, J., concurred.

Rule discharged.

CHANCERY.

Hunt v. White.

Vendor and purchaser—Covenant—Quiet enjoyment.

A covenant for quiet enjoyment given by vendor to purchaser does not extend to protect the purchaser from a defect of title which the recitals of the deed, in which the covenant is contained, were sufficient to disclose.

[V. C. M. Feb. 23.—16 W. R. 473.]

This was a petition by S. Rogers, who had purchased property from W. M. Bush, the testator in the cause, praying that he, S. Rogers, might be admitted as a creditor against the testator's estate for damage in respect of a breach of the covenant for quiet enjoyment contained in the purchase deed.

It was believed, when W. M. Bush conveyed the property to the petitioner, that W. M. Bush was entitled to the estate in fee absolutely, whereas he merely held the fee simple subject to be divested on his death without issue, which event happened. The deeds recited in the conveyance from Bush to the petitioner were sufficient to disclose this defect of title.

The persons who took the estate on W. M. Bush's death without issue, brought an action against the petitioner to recover it, and there was no defence to such action. The petitioner therefore brought in a claim before the chief clerk in the suit filed to administer the testator's estate, to be admitted a creditor in respect of the damage he had suffered by being thus ejected. It was admitted that the covenant for title was restricted to the covenantor's own acts, but the plaintiff relied on the covenant for quiet enjoyment, which it was contended was an unlimited covenant, not restricted to the covenantor's own acts. The chief clerk refused to admit the claim of the purchaser, who thereupon presented this petition.

Browne, for the petitioner, cited Sugden's Vendors and Purchasers, 14th ed. 606, as to the generality of the covenant for quiet enjoyment, and contended that damage occasioned by the vendor's want of title, came within the provisions of that covenant.

Downing Bruce for trustees.

Cole, Q C., and *Stiffe Everitt*, for other respondents, were not called on.

Malins, V.C., said that the covenant for quiet enjoyment could only extend to incumbrances and defects in the title of the covenantor, of which the purchasers had no notice; if the vendor had secretly created a mortgage, the covenant for quiet enjoyment would have protected the purchasers against that, but here the damage to the purchaser arose from misconception of the vendor's title as disclosed by the deed of conveyance itself. It could not be reasonably contended that the covenant extended to cover such a defect as this, especially as the covenant for title was restricted to the covenantor's own acts. The petition wholly failed, and must be dismissed with costs.

GENERAL CORRESPONDENCE.

Insolvent Acts—Assignees.

Belleville, 31st March 1868.

To the Editors of the Law Journal.

Gentlemen,—"A communication under the caption, *Assignees in Bankruptcy matters—The operation of the Act*, appears in the *Local Courts and Municipal Gazette* of March, 1868; wherein the "Scarboro" correspondent asserts that, "The working of the Act since 1864 clearly proves it to be a bungled, defective affair," and he proposes, "to point out a few of its defects and in addition to refer to the conduct of *official assignees*."

"Scarboro" points out what he thinks are defects in the Act, and refers to the conduct of official assignees, but omits (except by his own assertion, that the working of the Act clearly proves it to be a bungled affair) to give instances where there has ever been any failure in the working of the Act. Many insolvents have been refused, and many more have obtained discharges; and it must be assumed, that these insolvents, who have been refused discharges ought not to have obtained them; and, if they deemed the judges decision erroneous, the Superior Court, on appeal, might have rectified the error or confirmed the decision; and any one creditor has the right of appeal against the decision granting the discharge. Therefore, it follows, that, if any insolvent has been wrongfully refused or has improperly obtained a discharge—it is not the fault of the Act, but of the insolvent or his creditors as the case may be. It is denied that because the assignee is corrupt, and deceives the creditors—that the Act is a bungle, or defective. The official assignee is bound to give security "*for the due performance of his duties*," and the creditors assignee is bound to "give such security and in such manner as shall be ordered, by a resolution of the creditors; and shall conform himself to such directions, in respect thereof and in respect of any change or modification thereof or addition thereto, as are subsequently conveyed to him by similar resolutions"—which bond is to be taken in favor of the creditors and deposited in the proper Court. The assignee is likewise under the summary jurisdiction of the Court and the performance of his duties may "be enforced by the judge on petition in vacation or by the Court on a rule in term under penalty of imprisonment, as for contempt of Court whether the duties are imposed on him by deed of assignment, by instructions of creditors communicated to him or by the terms of the Act."

His duties are well defined and performance can be enforced which proves there is no bungle or defect in the Act in that respect. If "Scarboro" knows that "the working of the Act since 1864 *clearly* proves it to be a bungled, defective affair," because the insolvent "selected the official assignee *to get him through for a certain fee generally* $50," he impliedly admits that his creditors allowed a public officer to deceive and injure them whilst the Act affords a most severe and certain remedy. If creditors neglect to secure professional assistance and permit assignees to deceive them, "Scarboro" ought to blame the bungling, careless creditors, not the Act.

No doubt many men have obtained discharges who have not made a full disclosure of their estate, some owing to perjury—others through the neglect of the creditors. But this does not prove the Act a bungled or defective affair. "Scarboro" reminds me of Lord Palmerston's reply to the Scotch Clerical petition to the Government to set apart a day of prayer to our Lord, to remove pestilence, which was that the pestilence was caused by filth and to remove the cause instead of praying, and the pestilence would abate, so I say, if creditors will employ good counsel and remove the corrupt assignees, "Scarboro" will fail to see the bungled, defective Act.

For instance, if an assignee gives a certificate that the insolvent "has complied with all the provisoes of the Act, has attended all meetings, has filed a statement of his affairs on oath, fairly showing how he has disposed of his property," &c., and it can be proved that the certificate is untrue, there can be no difficulty in applying a remedy. If it cannot be shown or is neglected, it is presumed true, and creditors have no cause of complaint; at all events it is not the fault of the Act. It is admitted that legislation is not always perfect but it is denied that it is always imperfect. In ninety-nine cases out of one hundred, Statutes are declared defective by persons too lazy to study them or too ignorant to understand or properly construe them, or too negligent to take advantage of their provisions.

It is a remarkable suggestion, "that if a man has once gone through the insolvent

$1,000, at a high estimate, which would not pay the chattel mortgage he gave his sister. He owed these creditors, B., C., D. & E., besides, and his landlord over $1,000. He had some valueless interests in lands heavily mortgaged. And if it were possible to find a debtor or a case coming within the meaning of section 18 of the act of 1859, this debtor A. and this case came within such meaning. Yet it was held at the court by the learned deputy judge, that the chattel mortgage of 1868 must prevail, and the creditors be sent to the wall, the sister of A. taking all the goods!

The decision was alleged to be made on the ground that A. swore he did not *mean* to defraud—that he had some interests in mortgaged lands. If we look at the strict, searching clauses of the section, as marked with figures by me, we will see that it matters not what the debtor may swear as to his intents, when those intents are contrary to the patent facts of the case. We are to judge of a man's intents by his acts. If A. conveys all his chattel property to his sister F., leaving all his other creditors with nothing—prefers her by a chattel mortgage, what is the true inference? He has preferred one creditor to another, and put it out of his power to pay any other. He has shown himself unable to pay his debts in full by paying only one, and leaving unpaid many others. Who cares what he may swear about his intents? The law points out the fact of what he has done, and what exists; and that is, that he has divested himself of all his property to pay one, to prefer one over all. If the act did not intend to prevent such a thing, what is its meaning?—what is it worth? A man may have uncertain interests in mortgages of lands, or may even, if the lands are sold well, be able to pay all he owes; but that fact would not make such a sale as I refer to good under the act of 1859.

We yet have to see what it means when it says a debtor shall not prefer one creditor to another, by transferring all his goods. Creditors having judgments and executions are not to be defrauded by chattel mortgages set up by one, and told to go and look to some uncertain interest in mortgaged land. One creditor has no right to step in and take all the available goods of a debtor by a chattel mortgage, and stop other equally deserving creditors from getting anything.

The act of 1859 was not intended to interfere with chattel mortgages, or sales made by persons who had goods amply sufficient to pay all their creditors if sold. A chattel mortgage made by any perfectly solvent person, one who at any time could show chattel property enough to enable a sheriff to make the amount of all executions placed in his hands, is no doubt good in law; but if such a person simply had lands, and were to transfer all his goods to one person, having at the same time judgments against himself on which executions could or were about to issue, then it might be very fairly asked whether that debtor had not preferred—had not given one creditor an illegal preference over his other creditors.

It is quite evident that the act of 1859 was passed for the benefit of creditors, upon a generous view of the law, and no crimping construction should be given to it.

If, as in this case, a debter owes a relative $1,500, which sum more than covers all his chattel property, and on the eve of the levying of several executions gives a sweeping chattel mortgage of all to this one relative or creditor, could any lawyer say that he did not bring himself within the meaning of some part of sec. 18?

It may be said, he swears his intention was not to do so; but that is simply nonsense, as the act is self-evident. Would he have done so if he had not owed many others—had not been about to be sold out, being on the eve of insolvency? Does he not patently give a preference to one creditor, and set at defiance all others? These are the pertinent questions. It is greatly to be lamented that courts and judges will not construe acts of Parliament in the spirit in which the Legislature passed them. Further, no case can be found, or was quoted or produced, under the evidence in this interpleader case, to warrant the decision.

C. M. D.

APPOINTMENTS TO OFFICE.

DEPUTY JUDGES.

CHARLES ANDERSON SADLEIR of Osgoode Hall, and of the City of Hamilton, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court, in the County of Wentworth, in the said Province. (Gazetted, March, 14, 1868.)

CHRISTOPHER CHARLES ABBOTT, of the City of London, in the County of Middlesex, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of and for the County of Middlesex, in the said Province. (Gazetted, March, 21, 1868.)

GEORGE LEVACK MOWAT, of Osgoode Hall, and of the City of Kingston, in the County of Frontenac, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of and for the County of Frontenac. (Gazetted, March, 28, 1868.)

DIARY FOR MAY.

2. Sat. ..Articles, &c., to be left with Sec. Law Society.
10. SUN..*4th Sunday after Easter.*
13. Wed..Last day for service for County Court.
17. SUN..*5th Sunday after Easter.*
18. Mon..Easter Term begins.
21. Thurs. *Ascension Day.*
22. Frid..Paper Day Q.B. New Trial Day C.P.
23. Sat. ..Paper Day C.P. New Trial Day Q.B. Declare for County Court.
24. SUN..*Sunday after Ascension.* Queen's Birthday.
25. Mon..Paper Day Q.B. New Trial Day C.P. Last day to set down for re-hearing.
26. Tues..Paper Day C.P. New Trial Day Q.B.
27. Wed..Paper Day Q.B. New Trial Day C. P. Appeal from Chancery Cham. Last day for notice of re-hearing.
28. Thurs. Paper Day C.P.
29. Frid..New Trial Day Q.B.
30. Sat....Last day Court of Revision finally to revise Assessment Roll.
31. SUN..*Whit Sunday.*

THE

Canada Law Journal.

MAY, 1868.

JUDICIAL CHANGES.

Easter Term opened with the profession looking forward, some with anxiety, and some with curiosity to expected judical changes, bringing honors to the few, and disappointment to the many; and affording a fund upon which those whose business is principally composed of "other peoples business," could draw largely and descant upon wisely or foolishly as the case might be.

The rumours that have been circulated are numerous, and all hinging upon an event which, when it takes place, must bring deep sorrow to all; namely, that the Chief Justice of Upper Canada, has resigned his seat on the bench, or is about to do so. He is speaking of him as one of a class, "the last of his race," and we do not fear the ill-will of any one, when we say that there is no one to fill his seat when he leaves it. It is still, however, satisfactory to have (we hope we may say) the assurance that his dignity and learning will not thereby be lost to the country, in that he will probably be selected to preside in that Court of Appeal for the whole Dominion, which we hope soon to see established.

This removal to a more exalted position—for as such we prefer to speak of it,—would leave a vacancy that it is said will create not one, but several difficulties. The name most commonly spoken of as a possible Chief, is the present Chancellor, an appointment that would we think give entire satisfaction to the profession. His unquestioned ability and judicial capacity point him out as a most likely man for the place, and there are reasons why he would be even more useful on the Common Law bench, than as a judge in Chancery. As a mere matter of promotion he is now next in point of precedence to the Chief Justice, though it may seem somewhat anomalous to change an Equity judge to the Common Law bench.

The principal difficulty then would seem to be, to find a suitable successor for him. Many chancery men would dislike to see such a faithful servant of the public as Mr. Spragge, passed over. But as to this, it is just as well that it should be distinctly understood, tha puisne judges, either Equity or Common Law, have no claim of right to expect promotion as such. It has always been the rule in England, that the appointment of all the presiding judges in the Superior Courts is a matter wholly in the discretion of the government of the day, unfettered by pretence of right of the puisne judges to promotion, and the appointments have generally been political, or for state reasons, the selection being made from the ranks of the bar, and not from those already holding seats on the bench, the Attorney General having the right, if he pleases, to take the position himself.

It is undoubtedly true as a matter of fact, that the majority of our Chief Justices have risen step by step to that position; but that proves nothing, except that special reasons at the time rendered it advisable so to promote them, but this promotion was not by seniority; and both Mr. ex-Chancellor Blake and the present Chancellor were members of the government, immediately before they were appointed. Whatever appearance of unfairness there may be in this rule, there is, in reality, none, and it has been found to work well, both here and in England.

Looking then at those who are in political life and otherwise qualified for the office, Mr. Edward Blake's name has been mentioned in connection with the office, but we question whether it would be offered to him. His legal knowledge has proved of great use in the Legislature, and there does not appear to be any political reason, so far as we have heard, why he should be requested to shelve himself. It is even more questionable, whether he would accept the offer, even if made. His present

position is such, that it would seem unlikely that he would accept it. He is young, full of strength and energy, ambitious, in receipt of a large income from his profession, much larger we doubt not than the salary of office would be; he is on the threshold of political life, a rising and successful counsel with no equal at the Chancery bar, with the single exception of Mr. Strong (who is said to be in some respects even his superior, but has no claim on political grounds), and altogether with such prospects before him, that it is difficult to believe that he would be content to give up the excitement of political life at this early period of his career.

Others there are who would have a claim upon the government for the seat, and could command strong political interest, and perhaps fill the office fairly and respectably; but there is no one "head and shoulders" over his fellows, that the profession can look to as a likely man. Failing then an outsider, Mr. Vice-Chancellor Spragge's name comes up again, and his appointment would create an opening for a new Vice-Chancellor which could more easily be filled; and Mr. Gwynne's name suggests itself. He has already shewn himself a capable man for the bench, so far, at least, as we may judge from experience in presiding occasionally at Nisi Prius. There are, however, others from whom a desirable selection might be made for Vice-Chancellor.

But if the Chancellor be not appointed to the Chief Justiceship, where are we to look for a Chief. The qualities necessary to fill the position with comfort to himself, pleasure to the profession, and advantage to the country, are such that it is not to be wondered at that there is so much difficulty in finding the right person for the position. Even from the physical strength and endurance required to perform the duties satisfactorily, it is difficult to obtain with the other requisites; and in speaking of this last requisite it is said that the senior judge of the Court of Queen's Bench, so thoroughly qualified for such an important position in point of learning and ability, does not possess the health or strength which has been spoken of as essential.

It is very much to be regretted that the Treasurer of the Law Society could not be induced to accept the Chief Justiceship, which it is said has been offered to him, but declined. His capabilities are so patent, and his public services of such long standing, and his efforts on behalf of the profession so great and so well appreciated, that his appointment would be looked upon by the profession as a deserved compliment to the bar in general. We are sure that nothing but the impossibility of giving up his numerous business engagements at such short notice, would prevent him from accepting an appointment that would redound as much to the credit of the Government as it would, under other circumstances, be in accordance with his own professional aspirations.

Whatever the appointments are to be, we hope there will be no delay in making them. It does not at present seem likely that either the Attorney-General for the Dominion, or for Ontario will take advantage of the privilege possessed by one or other of them; nor is there any member of the Government that would be likely to be appointed; and if so, there need, and ought not to be much delay.

Rumours of course are numerous, and one is, that failing the appointment of the Chancellor to the Chief Justiceship, the Chief Justice of the Court of Common Pleas would take that position, taking with him to the Court of Queen's Bench Mr. Adam Wilson, and that Mr. Hagarty would then be appointed Chief of the Pleas, with probably Mr. Gwynne as his Junior Puisne in that Court.

We think, however, we are correct in stating, that as yet no appointments have been made.

LORD BROUGHAM.

Recent despatches from England bring us news of the death of Henry Brougham, Baron Brougham and Vaux, in his ninetieth year, at his residence near Cannes, in France.

He was born in Edinburgh, on the 19th September, 1779, and was educated at the High School and University of Edinburgh, where he was laborious and successful. He became an advocate at the Scottish bar, in 1800, and about two years afterwards commenced his connection with the *Edinburgh Review*, to which he was for several years one of the most constant and eminent contributors. In 1807, he removed to London, and the year afterwards was called to the bar at Lincoln's Inn, where his great ablities and untiring energy made his success as certain and more brilliant than it could have been in the more limited sphere north of the Tweed.

Though his star was in the ascendant, both as a writer, an advocate, and as a outspoken, fearless statesman, the celeberity he acquired by his defence of Queen Caroline, brought him most prominently before the public, and made him for years one of the idols of the English nation. This masterly effort, and his speech on the Reform bill, were the oratorial efforts by which he was best known to fame, professionally and politically. He is, however, best known to those of the present day, as the greatest reformer, and particularly law reformer, of his day.

Mr. Brougham was appointed Lord Chancellor during Lord Grey's administration, and though not attaining to the eminence on the bench that he did at the bar, his energy was the same, and his zeal as untiring as before.

His powers of work were almost super-human. Such an intellect, combined with such physical endurance, and such a determined, dauntless spirit knew nothing of failure, until he had risen from an obscure position to the highest honours which his country could restore. He has left a name without which many pages of English history would be a blank, and his memory will ever remain as a beacon of encouragement to the industrious student, ambitious of success. Their motto should be what his proved to be, "Whatsoever thy hand findeth to do, do it with thy might."

LAW SOCIETY, EASTER TERM, 1868.

The following statement shows the result of the examinations for call to the Bar and for admission as Attorneys during this Term, in the order in which they passed.

For Call:

Maximum number of Marks, 850.

1. Mr. Mulock, ...307 marks;
2. " Moore, ...305 "
3. " Lash, ...304 "

who were admitted without oral examination.

4. Mr. Harman,
5. " Sparks,
6. " Fraleck,
7. " Dingwall,
8. " W. Bell,
9. Mr. Hall,
10. " Goforth,
11. " McMurrich,
12. " Barrett,

Nine gentlemen were rejected.

For Admission:

Maximum number of Marks, 300.

1. Mr. Garrow, ...271 marks;
2. " Lash, ...259 "
3. " A. Bell, ...254 "

who were admitted without oral examination.

4. Mr. Douglas,
5. " McMartin,
6. " Scott,
7. " White,
8. " Chamberlain,
9. " Boggs,
10. " French,
11. " Donaldson,
12. " Gibson,
13. " Berford,
14. " McDowell,
15. " Harman,
16. " Robinson,
17. " Elliott,
18. Mr. Dingwall,
19. " Duggan,
20. " Lillie,
21. " Capreol,
22. " Green,
23. " Greig,
24. " Beatty,
25. " Sewell,
26. " O'Leary,
27. " Bethune,
28. " Smith,
29. " Leet,
30. " Gray.

Four gentlemen were rejected.

SELECTIONS.

WHAT SHOULD BE A QUORUM OF JUDGES.

The recent change in the constitution of the Court of Appeal in Chancery, and the various plans which have been lately put forward, and are now under consideration, for reforming the law courts, suggest the consideration of the question.—What number of judges sitting together forms the best tribunal?

An independent observer of our judicial system must at first sight be greatly struck with the curious difference between the accustomed number at common law and in chancery. He would also, at all events until within the last few years, if he consulted members of both branches of the bar, have been struck with the uniformity with which they each preferred their own system. Members of the chancery bar have seldom been found to recognize the advantage of four judges sitting *in banco*, and common law barristers, for the most part, wonder how it is that suitors and the profession are satisfied with the decisions of a single judge in equity. These opinions are, doubtless, in a great degree, the result of the force of habit and of the conservation which has habitually pervade the profession. We cannot, however, think that such opinions are entirely without foundation in reason; still less that they were so formerly, when they were more universally entertained than they are now. The tendency of all recent legislation has been largely to increase what we may call the concurrent jurisdiction of the common law and equity courts. With this increase has grown up a feeling that the composition of the tribunals might, with advantage, be more nearly assimilated. Notwithstanding this, we think there may still be recognized a difference in the general nature of the questions which come before a common law court *in banco*, and before the Vice-Chancellors, and that this difference is of a character which makes it desirable that the decisions of the one tribunal should be based on collective opinion, while those of the other may be may be satisfactory, though only the expressions of invi-

dual opinion. Where arrived at merely by the exercise of powers of the intellect, the strength of a tribunal must be measured by that of its most gifted member. It may be weakened, but can scarcely be strengthened, by adding the judgment of an inferior mind to that of a superior. For a tribunal which has to decide such questions therefore, there can be but one reason—and that but a poor one—for having more than one judge, namely, the difficulty of selecting the best man. When, however, the questions depend upon practical judgment and experience of men and things, the case is very different. In such a case the greater aggregate amount of experience which is brought to bear upon any disputed point, the more satisfactory will be the decision.

Now, we think that the cases which come before the equity courts can more often be decided by the application of abstract principles, than those which the common law courts have to deal with. Such a distinction may be thought by some rather fanciful, and undoubtedly the rule, if it is one, is qualified by many exceptions. There is, however, one practical distinction between the business of the common law courts *in banco* and the Vice-Chancellors' courts, which is most important as regards the number of judges required—that is, that the business of the former is principally of an appellate character. We refer, of course, to the New Trial paper, which occupies by far the greater portion of the time during which the courts sit *in banco*. In a considerable number of these cases the decisions of the jury upon the evidence is reviewed by the court. The power of the court, while it is one which every one, experienced in the occasional results of trial by jury, admits ought to be possessed by the court, is yet one which all will agree ought not to be exercised by one, or even two judges. Indeed it is now a common cause of complaint, that the opinion of the one judge who tried the case, is allowed by the other members of the court to have too much weight with them, to the exclusion of their own judgment. Other cases again, in the new trial paper, involve the question of misdirection, which is a direct appeal from one judge to the court on a matter of law. In others, where the point has been reserved, the appeal is often from a merely formal decision of the judge, given for the purpose of bringing the point under consideration of the full court. Here, therefore, we have at all events the deliberate opinion of a judge that the point is one worth discussing, and as to which he does not care to rely on his own unassisted judgment. This may be thought not an insufficient reason why the tribunal to decide the point should be composed of several, and not of a single judge. Besides the new trial paper, the courts *in banco* are occupied with motions, the special paper, and in the case of the Court of Queen's Bench with the Crown paper. Now, many of the motions are for new trials, and to these of course the remarks made upon cases in the new trial paper apply. Others are appeals from judges at chambers, which seem to us to require a full bench of judges. Others, again, are applications for the exercise of the discretion of the court in various matters, upon which the decisions of a bench are more likely to be satisfactory, because less likely to be arbitrary, than those of an individual judge. Some few motions, doubtless, are made to the court principally on matters of practice, which might well be disposed of by a single judge, but these occupy but a very small portion of time, and, although they might with advantage be heard, together with the chamber business of the judges under the new rules, before a practice court, we think they do not afford any argument for materially reducing the number of judges sitting *in banco*. As to the special paper it consists of demurrers and special cases. Here, the law has to be applied to admitted or agreed states of facts. As regards special cases, however, it has become a common practice to state certain facts, leaving the court to draw the same inferences that a jury might have done as to other facts which may be material to ascertain the rights of the parties. In these cases the judges really act as jurymen, and the number of independent judgments may be of importance. In other cases, in the special paper, there can be no doubt that the weight and authority of any decision will depend more upon the reputation of the judges who gave it for legal knowledge, than upon their mere number Here, therefore, if the selection of the judges on the ground of their legal knowledge could be guaranteed, the tribunal might consist of a less number of judges than at present, and even of a single judge. With regard to the Queen's Bench Crown paper, a few of the cases are appeals from magistrates and the like, and of considerable practical importance; but as Chief Justice Cockburn lately remarked, most of the Crown paper days are occupied by the court in trying to make sense of other people's nonsense. Either some hopelessly inconsistent sections of Rating or Public Health Acts have to be reconciled and applied by a kind of *cy pres* process, or else the meaning of the Legislature has to be discovered in one of those cases where the only thing that is clear, is, that the point was never foreseen, and that the Legislatnre had no meaning at all with reference to it. Until the judges are relieved by better workmanship in law-making, from this distressing and useless kind of employment, it would perphaps be better for the public, though rather hard upon the judge, to confide it to one than to several. On the whole therefore, looking at the character of the work done by the common law courts *in banco*, we think there are good grounds for continuing to have a bench of judges and not a single judge. In addition to the reasons arising out of the character of the work, it must be remembered, that judges are in practice, though not of coursein

theory, appointed for reasons other than the probable amount of their judicial faculties; and even where this is not the case, the faculty which justifies the appointment may be rather a capacity to assist juries in dealing with facts, and in other respects to preside with efficiency at *nisi prius* and in criminal trials. This faculty by no means always accompanies the legal learning required *in banco*, and yet it is obviously convenient not to have special judges for the different departments. As regards the actual number required, however, we certainly incline to the opinion that three is as good as four, and much better than four, three or two, according to chance, as we have now. Of course it would be foolish so to fetter the discretion of the judges as to interfere with the dispatch of business, when accident prevented the formation of a full court, but if the number to sit is reduced to three, it ought to be understood that it is not meant that two should sit as often as three do now. Three is a good number, because there must always be a majority, and also because the judges can consult together on the bench more easily than if there are four.

With regard to the equity courts of first instance, we know of no desire on the part of the profession or of suitors, at all events until they have lost their cause, to be heard before more than one judge. This, however, does not apply to courts of appeal. We have before expressed our opinion of the bad policy of the recent change. It is not too much to say that there has been no court in the kingdom which has worked so well and given so much satisfaction generally as the Lords Justices Court as recently constituted. It is perhaps needless to say we are not, in speaking of the constitution of the court, referring to the individuals who compose it. Indeed, we are almost afraid that Lord Cairns and Sir John Rolt, may do their work when sitting singly too well, so that it may become so much the practice for them to sit alone, that in future, when men less competent to review the decisions of other judges may fill their places, it may be difficult not to follow the usual course. We think the Act introduced a foolish and unnecessary change. We believe it was done in order to remedy an accidental inconvenience from the illness of one of the judges. It would surely have been much better to have given to some one, either the Lord Chancellor alone or in conjunction with one of the Lord Justices, a power to appoint a deputy for a limited time. The change is sometimes justified by saying, that there is even less security that the Lord Chancellor will always be a good equity judge, and that he has always had power and been in the habit of sitting alone, although he has now power to call in assistance. This seems to us a far better reason for appointing a third Lord Justice to assist the Lord Chancellor, than for interfering with, perhaps, the best court in the kingdom. The subject of the Court of Exchequer Chambers is a difficult one; several plans may be suggested for preventing a minority of judges overruling a majority, as now happens occasionally. This might be effected by counting in the judgments of the judges below, where there was a difference amongst the judges above, by which method, however, the possibility of a change of opinion upon re-argument is not provided for. Perhaps as simple and practicable a plan as any would be to require for the reversal of a decision of the court below a minimum number of six judges and a majority of two to one in favour of reversing the decision. Under this plan, assuming the number of judges below to be reduced to three, there would only be one possible case in which a minority could overrule a majority, viz., four against five. There would not be much practical harm in this, as the opinion of the judges below are clearly not of equal value with those of the judges above, who are able to weigh the reasons given in the judgments below, and also have the advantage of another argument often by different counsel.—*Solicitors' Journal.*

ON THE UTILITY OF OATHS.

(By Edward Gardner, L.L.B.)

The subject of oaths and declarations taken in various departments of the State has latterly attracted the attention of Parliament; and during the session 1865–66 a Commission was held to inquire what oaths, affirmations, and declarations are required to be taken or made by any of Her Majesty's subjects in the United Kingdom other than those taken or made by members of either House of Parliament, or by prelates or clergy of the Established Church, or by any person examined as a witness in a court of justice, and to report their opinion as to the dispensing with or retaining and altering such oaths, affirmations, and declarations. To the report made by the Commission, are appended 300 closely-printed pages of oaths and declarations taken by the holders of different offices on their appointment to them, and to these many others might be added which the Commissioners seem to have missed. Passing over the report itself, which appears to be fully concurred in by one only of the five Commissioners who sign it, we come to the dissent of Commissioners Lyveden, Bouverie, Lowe, Maxwell, and Milman, who seem to have brought their great intellects to the examination of a question in a truly philosophic spirit. They come to the conclusion that by far the greater number of the oaths into which they had examined, ought to be abolished, and the rest changed into some convenient and distinct form of declaration:—

"The imprecatory forms of oath in common use," they say, "appear open to very grave objections. Such oaths seem to assume that God's vengeance may be successfully invoked, and God's help declined or accepted by frail and fallible man, or made conditional on the truth of his assertions or the fulfilment of his promises—notions

which seem inconsistent with the teachings of religion and of reason."

The limits of this article do not admit of detailing the arguments of these five dissentients. To those who would wish to pursue further the study of the subject opened up by the Commission, and who may not be inclined to adopt the views set forward in this paper, a careful perusal of the dissent referred to is earnestly recommended.

A glance at three hundred closely printed octavo pages of oaths and declarations taken by members of Her Majesty's household, officers of public departments, of courts of justice, by soldiers, sailors, and volunteers, by county, borough, and parochial officers, by recipients of the different orders of knighthood, by members of universities, colleges, and schools, of tradors' guilds, of various incorporated societies; a glance at these is surely enough to set us thinking on the wholesale swearing that seems to be required in almost all the public relations of life; and to the catalogue are to be added several oaths and declarations that have been omitted, also those taken by members of both Houses of the Legislature, by the prelates and clergy of the Established Church, and by jurors and witnesses in courts of justice.

History tells us that oaths were taken in the earliest ages of which we have any records; and the compilers of legal history, wholesomely impressed by precedent, assert that, "however absurd or perverted by ignorance and superstition, an oath in every age has been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct, or as a guarantee for the veracity of narration."* Under some of the deductions from and abuses of the civil law, of which the middle ages were fruitful, heathens, Jews, and other persons, whose opinions ex-cathedra fulminations then stigmatized infidel, were declared incompetent to be witnesses in courts of justice. The giving of evidence the old lawyers considered rather a right than a duty, and consequently incompetency was a fitting punishment on the holders of obnoxious opinion—a punishment in which frequently the innocent Christian was included, who, having a suit to maintain, happened to have only the evidence of rejected witnesses on which to rely. And Sir. Edward Coke, not free from the bigotry of his time, is found to declare that an infidel (*i.e.*, any one who was not a Christian) could not be a witness: "All infidels," he says, "are in law, perpetual enemies, for between them as with the devils, whose subjects they be, and the Christian there is perpetual hostility and can be no peace." About the year 1745, a better spirit seems to have dawned upon our tribunals, and in a celebrated case† then argued, it was decided that the words "so help you God" are the only material part of the oath, which any heathen who believes in a God might take as well as a Christian. Consequently, the kissing the Evangelists—with or without a cross on the cover—in England and Ireland; the uplifted hand in Scotland, the touching the Brahmin's hand and foot in India, the placing the forehead on the Koran in Constantinople, and the breaking of a saucer in China, are all mere forms surrounding the great substance "so help you God." But our cousins on the other side of the Atlantic seem to be wandering away from what we may call the imprecatory sanction of the oath, for their books say that witnesses are not allowed to be questioned as to their religious belief—not because it tends to disgrace them, but because it would be a personal scrutiny into the state of their faith and conscience foreign to the spirit of free institutions, which oblige no man to avow his belief.* With them the curious anomaly could not have happened, which was made patent to the British public a few years since, in a case brought by a man called Maden, in an English County Court.† His only witness was his wife, who, on being examined on the *voir-dire*, stated that she did not believe in a God or in a future state of rewards and punishments. Her evidence was rejected because she dared to speak the truth; had she lied and professed the necessary belief, her testimony must have been received. The Judge had no sympathy with the witness, but, assuming to be an authority in religion as well as law, he told her that she must take the consequences of her disbelief in the loss of her property, the subject matter of the suit.‡ Happily, Atheists are rare; were they however more numerous, the interests of justice must long since have demanded the admission of their evidence. Truth is what a court of justice desires; the exclusion of the honest infidel will not secure it, and the dishonest will not hesitate to profess the necessary qualifications for giving evidence.

Having taken this hasty glance at the history and nature of oaths, let us for convenience divide them into the same classes as those adopted by the five dissentient Commissioners whom I have already named. We have then:—

1. Oaths. to the breaking of which no penalties are attached by law, and

2. Oaths, to the breaking of which the law does attach a penalty.

1. Of the first class are (1.) oaths of allegiance, and (2.) oaths of fidelity in the discharge of duties.

(1.) As to the oaths of allegiance the dissentients with significant brevity state, that—

"In peaceful and prosperous times they are not needed; in times of difficulty and danger they are not observed. Contemporary history affords

*Best Ev. § 56.
† *Omichund* v. *Barker*.

*Greenleaf Ev. § 370.
† Rochdale Co. Ct., Feb. 1861.
‡ Her mother was the defendant; she had neglected the religious instruction of her daughter, and thus took advantage of her own wrong.

abundant proof of the inefficiency of political oaths, whether taken by the people to their rulers or by the rulers to the people."

It is the duty of all subjects to bear allegiance to their rulers, and the anomaly is a curious one, discoverable no doubt in all societies, of requiring a man to swear to perform that duty, which he not only ought to be presumed, but which the very fact of his being a subject compels him, to observe to his Sovereign. Somewhat similar is the peculiarity remarked by a surprised Frenchman of certain of our Irish brethren joining together and agreeing to be loyal; agreeing to be what they ought to be, agreeing to do their duty, and therefore considering themselves worthy of all praise, as faithful observers of political morality. Ordinary civiljans are not called on to take the oath of allegiance, yet it behoves them to be equally as loyal as the soldiers who swear an oath, which even when they hear they hardly understand.

(2.) Then as to the oaths of fidelity in the discharge of public duties, they have never stopped the unworthy at the threshold, and the worthy did not require them to quicken their sense of duty. Such oaths seem to be in the nature of contracts, which might be entered into in a manner much more satisfactory than by embodying them in their present form. With a writer of the year 1834, quoted by the Commissioners, it is only common sense to hold that—

"No man should ever be called on to promise to do what he is bound by the duties of his office to perform, on the contrary, it should, in every way, be declared that every man has already promised to do his duty by the very act of accepting office." *

There are two motives, or, to use a perhaps more correct phrase, two sanctions for the observance of the class of oaths we are now considering, namely, the sanction of interest and the sanction of religion. Now, if an enlightened self interest does not impel to honesty in the discharge of a duty, it is very questionable whether the religious sanction will secure faithfulness in the office. The oath will not generate a conscience, and, where this is wanting, happiness here or hereafter ceases to persuade, and Hell offers no terrors. Even a tendency to superstition, which we too often shamelessly encourage, can have no place in one devoid of the moral sense. Worldly gain, present or prospective, is the sure reward of faithfulness. But, it may be said, a little wrong, scarcely possible of detection, may be done with advantage to the wrong-doer, and in such case self-interest inclines to the doing of it. The proposition may be questioned; but admitting the force contended for, the moral sense of right and wrong should be potent to resist the temptation, and, if it be not so, an oath cannot strengthen the weak conscience. As to the sanctity of the oath (a phrase which is scarcely intelligible) in what does it consist, since the practice is recognized of taking the oath as a matter of form, and disregarding its whole spirit? Oaths and declarations taken by officers of the army against the payment of money for commissions may be mentioned; these, however, common decency abolished some years ago, and the Report points out some other oaths which were, and are, taken not to be observed. Examined from whatever point of view, an oath must be found not to possess in itself any sanction whatever for the due observance of the duty sworn to be faithfully performed.

2. Passing away from oaths of office we come prepared in some degree for an examination of judicial oaths, or that class of oaths to the breaking of which penalties are attached by law.* A witness is sworn in a Court of Justice to tell the whole truth; should he lie, a temporal punishment is imposed on his being found guilty of the offence, and further, say the clergy, he has earned punishment hereafter for having laid perjury to his soul. We shall not stop to examine the feeling of certainty or uncertainty as to this latter reward, that may be present to the mind of him who swears falsely; the question is not one of any importance to the object aimed at in this paper.

Stripped of the legal sanction, this class of oaths is very similar to that we have been considering. It is every one's real interest to speak the truth,† and should any motive induce one to swerve from it the oath has no charm to prevent if conscience be dead to the sacred character of truth itself. If motive and conscience be acting in contrary directions the repetition of no formula can give power to the latter. A lie is a lie on the street or on "Change, as much as in a Court of Justice, and why should its utterance be considered more heinous in the one place than the other? As great interests depend on the honest dealing of man with man as on speaking truly before a judge and jury. But if we exalt truth in the one case by investing it with a sort of specially made garment, of necessity its position in the other case is altered, and it becomes a less crime to tell your neighbour such a lie as may enrich you and impoverish him than to swear falsely to some insignificant fact in a Court of Justice. A lie, we are in effect told, is not so bad a thing in our every day contracts, but in a Court of Justice is something awfully wicked. Yet wherein does the difference consist? A lie has been told in the presence of God as deliberately in the one case as in the other. But truth has received in a Court of Justice a fictitious importance,

* J. Endell Tyler, "Oaths," p. 68.

* With this class the Commission was not concerned.

† It being more easy to tell the truth than a lie, some writers speak of a natural sanction for truth, meaning that it is more natural or easy to draw upon the memory, than the imagination.

"From the mouth of the most egregious liar," says Bentham, "truth must have issued at least one hundred times for once that wilful falsehood has taken its place." (Ev 82.)

and the tendency outside is not to stamp a lie with the severe condemnation which it merits. In the desire to secure veracity in our tribunals the interests of truth generally have been overlooked, they have been completely lost sight of, and society suffers in all its dealings in order that a result might ensue, which deeper investigation into the subject must prove to be not obtained. In ordinary dealings, and in ordinary conversation, we frequently find individuals not only pledging their honours, but willing to give their oaths as guarantees of the correctness of their assertions, and our common experience teaches us that when such guarantees are offered those individuals are lying most. A show of candour too frequently indicates its complete absence; and when we hear a man prefacing his statements with the phrase "to tell you the truth" as a sort of advance guard we may look out for being deceived in someway or other. Assuredly the injunction "swear not all" possesses more meaning than the heated controversies of sects have allowed us to perceive. A keen observation of human nature on the part of the Founder of Christianity, which is manifested again and again in other philosophic reflections, prompted these words; and the attempt of Paley * to show that they were inapplicable to judical oaths entirely fails principally because he misprehended their meaning. "Let your communications be yea and nay, for whatsoever is more than these cometh of evil," these words show the idea present to the mind of the speaker that the truth is deserved by the addition of an oath. Were truth sacred in the market place, its character would not, and could not, suffer when uttered in a Court of Justice. Rid truth in the latter case of its unwholesome surroundings, let it stand out in its own abstract greatness and importance, and we shall be sure of truth being spoken in the street, and consequently more sure than at present of securing it in our tribunals.

Supposing, however, the proposition incapable of proof that truth suffers by being considered something higher when uttered before a wig and gown than it is when spoken in other relations of life, still the taking of an oath can only be justified on grounds of expediency. It must be shown, first, that the religious sanction is of avail where simple and unaided conscience would be weak and insufficient, and, secondly, that our lives and properties are really protected by the notions which people are supposed to entertain upon being put through the oath formula. Parenthetically it may be observed that with the legal sanction we are not at present concerned; that in some shape must always be maintained. The history of the law of evidence would furnish us with curious information on this subject, but to one only of its chapters need reference now be made, namely, to that which tells of the times when men, so far mistrusting each other, feared to examine parties in a cause, or even any persons interested, however remotely, in the result; and when justice was but too often defeated from the absence of any one who could testify to the matter in dispute save the plaintiff or defendant, and neither could be a witness. "*Nemo in propriâ causâ testis esse debet*" we borrowed from the civil law. "If the rules of exclusion," says Taylor, "had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature." At the commencement of the present century, Jeremy Bentham called attention to the absurdities of our system of evidence, and but 16 years have passed since complete justice in this respect has been done to that shrewdest of jurists. In 1833 interest ceased to be an objection to a witness; ten years later the person who had committed a crime was no longer excluded from the witness-box. In 1846 the English County Courts began to experiment on the evidence of plaintiffs and defendants and their wives, but it was not till 1851 that, the experiment having proved successful, Lord Brougham was able to induce Parliament to let in such evidence in almost all cases. Nor is the day now far distant when the mouth of a prisoner can any longer be kept closed. Yet, when Bentham's views began to be accepted, there were not wanting false prophets in abundance, who foretold the commital of the most dreadful perjuries.

Without entering into the various views as to what constitutes the essence of an oath, its supposed advantages cannot be more strongly stated than in the words of John Pitt Taylor. He says:—

"The wisdom of enforcing the rule, which requires witnesses to be sworn, cannot well be disputed; for although the ordinary definition of an oath—viz. 'a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth' may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God; not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so, still it must be admitted that by thus laying hold of the conscience of the witness the law best ensures the utterance of truth." (§ 1247.)

Again we are brought back to conscience as the something which is to be laid hold of for securing truth; it is the witness' conscience which is to be affected, and hence the meaning of the question—"Do you believe that oath binding on your conscience." We have seen, however, that the moral faculty is not supplied with new strength by the administration of an oath. It is our common experience that the religious sanction of the oath does not deter a dishonest witness, though the legal penalties for perjury undoubtedly frequently do. It is but seldom, too, that the witness pays any heed to the officer of the court who performs the

* M. & P. Philosophy Bk. III, p. 11, c. 61.

duty of swearing the witnesses; his mind is full of other thoughts, and if perchance he should give marked attention to the hurried words spoken by the officer, the jury receives his evidence with caution. A witness is never shaken by being reminded that he is on his oath, nor does the question—the resort of the "powerful feebles"—"by the virtue of your sacred oath do you swear so and so?" at all frighten him. Litigants frequently know, frequently imagine, that certain witnesses could, if they would, give certain evidence; they have been unable in conversation to get the desired admissions, but they seem to think that the swearing book has a magic spell. Despite the advice to the contrary of their lawyers, they have these persons placed in the witness-box, and the result is the usual one. A too frequently recurring illustration of this is in the examination of defendants to prove shop-debts due by them to the representatives of deceased traders, where the deceased was the only other person who could have given evidence.

That it is the regard for truth itself, unclothed with mystic rites, which secures reliable evidence in our tribunals, receives additional corroboration by resort to negative proof. For instance, we are often informed that the Judges of courts established by the British rule in various countries over the earth are continually puzzled to discover in those localities, where mendacity is the normal condition of the people, the real facts of the cases they are called upon to decide. Before a class-fellow from the halls of this college,* now a Judge in India, the following case was presented:—The plaintiff, a money-lender, complained that he had agreed with the defendant to lend him 100 rupees, that he had given him 20 on account, and that the remaining 80 were to be given on his coming and executing the bond for repayment, but the defendant never returned to execute the bond, and he refused to pay back the 20 rupees advanced. The defendant replied that he had required a loan for a few days, that he had signed a bond to the plaintiff for 100 rupees, but only received 20 on account, the plaintiff saying that he would give him the remainder on the following day, but, in the meantime, defendant discovered he could do without the loan, so he repaid the plaintiff the 20 rupees lent, and got back his bond, which he produced. Each party set forward witness after witness in support of his case, the Judge adjourned again and again, and, at the time I heard the story, was unable to come to any decision. Olden times would have suggested "wager of law," some ordeal, or the "decisory oath," and the Judge under the civil law would have exercised his discretion, and administered the "suppletory oath."*

But who shall say that truth would any the more have been discovered? It is not a little remarkable that the great foreign jurist Pothier, in speaking of these additional oaths, said:—

"I would advise the Judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disreputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred, and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted."†

Had it occurred to that great jurist, when he used these words, that oaths in general might be dispensed with altogether, the very same view he must have applied to the entire class, which he held with reference to the limited and extraordinary class then under his consideration. Perhaps, too, the earnest student of our great English jurist would discover that he questioned the utility of all oaths.‡

The opinions, however, of great jurists need hardly be quoted for judges and juries who are supposed, next after the witness, to be impressed with the oath taken by him, throw aside altogether the consideration that the evidence has been sworn to; and in their decisions they are wholly guided by the credibility of the facts, which, in their eyes, receive no additional confirmation from the oath, nor does the oath, on the other side, lend to the opposing statements any strength whatever. And this seems to have been always the case, for we find one of our oldest law books in ordinary use, speaking of the "demeanor of a witness and his manner of giving evidence as oftentimes not less material than the testimony itself."*

Our lives and properties are not protected by the oath, nor does its imposition affect the conscience; on grounds of expediency therefore it fails to be serviceable. Moreover, we have seen that the interests of truth generally are prejudiced by the fictitious importance attached to an oath. On an examination of the question, then, both negatively and positively, the conclusion is forced upon us that public policy demands an alteration in the swearing laws. There is hardly a sin against society which is not referable to a disregard of truth; society may make laws to punish and deter, but the root of the evil remains untouched; we lop off branches and hope to preserve the dying tree; it is useless, the old story repeats itself. Let us follow however in the footsteps of an enlightened religion, and proclaim the securing of truth to be the great object of earthly laws. By truth we do not mean the metaphysical mirage often discoursed

* Queen's College, Belfast.

* The civil law permitted litigants to tender the "decisory oath," the one to the other, he who refused it lost his cause. It was the Judge's privilage in doubtful cases to administer the "suppletory oath" to either party.

† Obligations, by Evans, s. 831.
‡ Bentham, Evidence, bk. 2, c. 6.
* Starkie, Ev. 547, 822, 4th ed.

upon, but real, earnest, substantial truth, that we can lay hold of, and assure ourselves that this fact is real and that one indisputable, that this man's word is his bond and that man's honour unimpeachable, Let it be our object to secure truth in all relations of life, and then will be attained the end of all laws—that men should live happily together.—*Law Mag.*

PRESENTATION TO PROF. SHARSWOOD.

On Thursday afternoon, on the occasion of the retirement of the Hon. George Sharswood from the post he has long filled with such distinguished ability in the Law Department of the University of Pennsylvania, the gentlemen of the class presented him with a handsome piece of silver plate, as an evidence of their affectionate regard. The presentation was made by Samuel B. Huey, Esq., on behalf of the class, and was responded to by the professor in a feeling manner. His resignation is necessitated by the recent elevation of his Honor to the bench of the Supreme Court, the duties of which require his whole time and attention. It will be difficult to supply the place thus made vacant.—*Phil. Legal Intell.*

ONTARIO REPORTS.

ELECTION CASES.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

Reg. ex rel. Walker v. Mitchell et al.

Municipal election—Name of candidate omitted from list—Effect on result of election.

In the list of candidates for the office of township councillors given to one returning officer, out of five for the township, previous to the election, the name of Alex. Henry, one of the candidates, and who had been duly nominated for the office of councillor, was accidentally omitted from, and was not placed upon the list of candidates until half-past one o'clock of the first day of the polling, whereby Henry certainly lost six votes and possibly more. The relator and one Stubbs having an equality of votes, the returning officer voted for Stubbs, who, with two other candidates, having a larger number of votes, were declared elected as the three councillors for the township. The relator and Alex. Henry protested against the election, contending that the whole result of the election had been affected injuriously to one or both of them by the omission of the name.

Upon an application to set aside the election it was

Held, that it is not every irregularity that will vitiate an election, and that in this case the question to be decided was not as to the mere abstract ground of the omission of the name, but only what effect it had had upon the final result of the election; and that, as it did not appear that the result would have been different if the name of Alex. Henry had been properly entered on the list, the election should not be set aside.

Quære as to the right of the returning officer to add the omitted name to the list of candidates.

[Common Law Chambers, March 5, 1868.]

This was a *quo warranto* summons respecting the office of councillor of the Township of Caledon

The statement set forth that there were ten candidates nominated on the last Monday but one in December for the office of councillor to which three persons were to be elected, beside the reeve and deputy reeve, the names being Alexander Mitchell, George Atkinson, Samuel Stubbs, Justus Lemon, John Smith, Jacob Carrington, Nathaniel Patterson, Alex. Henry, Thomas Bell, and William Wilson Walker, the relator, and that a poll was demanded.

That the clerk should have provided the returning officers of the five electoral divisions into which the township is divided each with a certified list of such candidates; but the clerk did not provide the returning officer of No. 2 electoral division with such certified list, there being omitted from the list furnished to such returning officer the name of Alexander Henry, who had been duly proposed, and who was then and until the close of the election a candidate for the office of councillor of the township.

That the returning officer did not, nor did his poll clerk for No. 2 electoral division, enter in his poll book at the opening of the Poll, nor for several hours afterwards, the names of all the candidates, but omitted the name of Alexander Henry until a late hour of the day of election, whereby no vote was taken in his favour until about 2 o'clock in the afternoon, although there were electors present who would have voted for Alexander Henry if his name had not been improperly omitted as aforesaid; and whereby it became rumoured through the said division and other parts of the township that Alexander Henry was not a candidate, and in consequence many electors refrained from voting or voted for other candidates.

That the returning officer had no proper authority for entering the name of Alexander Henry upon the poll book in the afternoon of the 6th day of January.

That at the time of the declaration the relator, by reason of these and the other grounds mentioned in the statement, entered a written protest against the election of the three councillors returned as elected.

The affidavit of Wm. McBride, the returning officer for this division, stated the fact of the omission of Alex. Henry's name from the certified list of the candidates names furnished by the clerk of the township, and that his name was not entered as a candidate in the poll book till about half past one in the afternoon of the following day, and not until a number of electors had tendered their votes for him, and whose votes were refused in consequence of his name not having been on the list furnished by the clerk.

That at least six electors tendered their votes for Alexander Henry, which votes were rejected, and there may have been many others present who did not go through that formality, before the returning officer put his name on the poll book and ten votes were taken for him after his name was entered; and the general impression among the electors present was, that in consequence of the omission there would be a new election if the one then being held was protested against.

Alexander Henry stated, after mentioning the circumstances in general above referred to, that in consequence of the omission he believes the whole election for said office was disturbed, because he believes it was the general desire of the electors of the east side of the township that

the councillors should be elected from different parts of the township, so that all localities would be represented in the council. That he resides in the east side of the township, and he believes he would have received a large vote in the said division which is situate on the east side of the township if his name had not been omitted.

That the impression that he was not a candidate had become too general when his name was put on the poll book to enable him to regain what he had lost by such omission in the former part of the day.

That on the day of the close of the election he protested against the whole election.

George Dodds, the township clerk, stated that he sent word to the returning officer to insert the name of Alexander Henry in the poll book as soon as he became aware of the omission.

Joseph Dodds stated that he has reason to believe from his knowledge of the township and otherwise, that if Henry's name had not been omitted from the poll book he would have been elected; and in consequence of such omission several of the electors voted for candidates for whom they would not have voted, and the whole complexion of the election was changed by such omission.

The relator stated that the clerk declared the poll for the different candidates as follows:

John Smith	19	votes.
Justus Lemon	136	"
Jacob Carrington	101	"
Nathaniel Paterson	147	"
Alexander Henry	145	"
Thomas Bell	104	"
Alexander Mitchell	192	"
George Atkinson	244	"
Samuel Stubbs	187	"
Wm. Wilson Walker	187	"

That the clerk, in consequence of the tie between Stubbs and the relator, voted for Stubbs, and declared Atkinson, Mitchell and Stubbs the three duly elected councillors.

That on the day of and before the declaration he protested against the election on the ground of Alexander Henry's name having been omitted from the poll book of one of the divisions, and in consequence the whole result of the election as he believes was changed, and on other grounds.

That Henry's election was injured in other parts of the township as well as in No. 2 division, and that the electors finding they could not vote for him voted very many of them for others for whom they would not have voted if the omission had not been made, and he believes if there had not been such an omission, he the deponent, who is also the relator, would have been elected to the said office.

Several affidavits were filed by the defendants, and amongst them two made by Samuel Stubbs and Alexander Mitchell.

Samuel Stubbs stated, that none of the persons, five in number, who are mentioned in the affidavits of the relator as persons who would have voted for Alexander Henry if his name had not been omitted, voted for the deponent Stubbs, who would not have done so had Henry's name been on the poll book from the first: that the omission did not increase the deponent's votes by a single vote; on the contrary, he would have had one more vote if Henry's name had been on the book.

Alexander Mitchell stated, that Walker had a vote from John White, whose name was not on the voter's list, and that the deputy returning officer for the said division also voted for Walker, and neither of them voted for Stubbs, and other persons voted for Walker who had not a sufficient property qualification: that only six votes were tendered for Henry before his name was put on the book, and ten votes given for him after it; and that deponent believes Henry would not have had more than from sixteen to eighteen votes if his name had been entered in the book from the first.

All of the defendants denied having had anything to do with the omission of Henry's name, and Henry's name was on the poll books for the other divisions of the township.

McMichael showed cause. Whether this proceeding be considered as taken against the defendants separately, or as impeaching the whole election, the relator must show that what he complains of has caused a different result than there would have been if there had been no irregularity. The relator does not show that the result would have been different from what it is. He cannot claim the benefit of those votes that were rejected for Henry. He cannot be allowed to say that some one else has got them who would not have got them if Henry had been voted for, and so the result of the election would have been different.

There are many instances where votes may be considered as abstracted from certain candidates, and yet they cannot claim the benefit of them, because they have not been effectually given.

If a disqualified person were a candidate all his votes may be lost, yet another candidate who is in the minority cannot defeat the whole election, or claim any benefit to himself on the assumption that if these votes had not been lost the result of the contest would have been different. So a candidate may, after receiving a certain number of votes, retire from the contest, yet the other candidates have nothing to do with his votes, nor are they allowed to consider how these votes would have influenced the position of the other candidates if they had not been thus thrown away.

So it might be reported wrongly that a candidate had retired, and votes might thus be given to others who would not have got them; yet another candidate, not even the one injured, could complain of this for the purpose of defeating the election.

Harrison, Q C., supported the application. The statute is imperative that the clerk shall provide the returning officer with a certified list of the names of the candidates.

The present relator can complain of these proceedings in like manner as Henry might have done. The alteration of the poll book was an unauthorized proceeding, for it did not then correspond with the clerk's certified list: *In re Charles* v. *Lewis*, 2 U. C. Cham. Rep. 171; *In re Hartley*, 25 U. C Q B. 12; *In re Coe*, 24 U. C. Q. B. 439; *In re Blaisdell* v. *Rochester*, 7 U. C. L J. 101; 29 & 30 Vic. c. 52, sec. 160, and subsections.

Adam Wilson, J.—I do not think I am obliged to hold that every irregularity shall defeat an election. The present case shows that it would be a harsh application of the law if it were made as it is claimed.

The clerk of the township in making out five certified lists of the candidates names for the offices of councillors omitted one of the ten names from one of the lists, so that the list for division No. 2 did not contain the name of Alex. Henry as a candidate, though the other four lists contained all the names correctly.

The affidavits show that six votes in No. 2 division were thus lost to Henry, and none were lost to him, as appears in the other divisions that I can make out, though something of the kind is suggested.

These six votes would have made no difference in the result of the contest so far as he is concerned, for they would, if added on to the 145 votes, give him only 151, whereas there were other two persons, Stubbs and the relator, who had 187 votes, and, unless their standing can be impeached, the additional votes if allowed to Henry cannot at all serve him.

But Walker, the relator, argues that they might have served *him*, and as there was an equality between Stubbs and himself, he might have had some additional vote or Stubbs might have had some vote less, and so he would have been returned; but this is a speculative view of his case and rights, and the result might have been just the other way.

If the omission of one of the candidates names from the list out of ten candidates must necessarily defeat the whole election, independently of any effect which that omission had or could have had upon the results of the election, I do not see why the omission of a single voters name from the book delivered to the returning officer should not as an abstract proposition produce the like consequences.

I think this must be determined by what effect the omission of the name has had or might reasonably be considered to have had upon the final result of the election, and not on the mere abstract ground of an omission; and viewing the case in this manner I do not see that the omission complained of did produce, or can be presumed to have produced any material change in the voting, and certainly none in the persons who have been seated as the elected members.

When bad votes are given an election is not interfered with unless those votes, if struck out, would put the candidate for whom they were given in a minority: *Reg.* v. *Thwaites*, 1 E. & B. 704.

This is the rule in every case of parliamentary scrutiny, for the enquiry is, which member has the majority.

In the election of mayor where a councillor was excluded from voting, and his vote in consequence of an equality would have elected a different person, the election was set aside: *The Queen* v. *Coaks*, 3 E. & B. 249.

In *The Queen* v. *Mayor of Leeds*, 11 A. & E. 512, the list of the councillors elected containing the name of P. as one of the number, was published by the particular time named in the statute. After the expiry of this time, and on discovering a supposed error, the mayor and assessors published another list containing the name of R. instead of P. The court held that P. having made the necessary declarations was the councillor *de facto*, and that all that was done in correcting the list after the hour fixed by statute was void.

Voting papers not signed and not shewing the situation of the property for which the voter was rated on the burgess roll were held to be bad. The object of the statute being to prevent personation as much as possible: *Reg.* v. *Tart*, 6 Jur. N. S. 679.

In *Seale* v. *The Queen*, 8 E. & B. 22, the mayor and assessors at the revision of the burgess list erroneously treated the burgess list *de facto* made out for one of the parishes as a nullity, and made out a fresh list for that parish, and inserted in it the name of a person in the original parish list who proved his title to their satisfaction, and the name thus inserted was transferred to the burgess roll. It was held that such person, though qualified in all respects to be on the list acquired by the act of the mayor and assessors, no title to be a burgess The lists sent in were valid, and the mayor and assessors had no power to do anything else, than to act on the lists sent in, by inserting or expunging names on these lists to ignore the list sent in, and to substitute a fresh one was wholly illegal,—the plaintiff in error was charged with usurping the office of burgess.

Brumfitt, appellant v. *Bremner, respondent*, 9 C. B. N. S. 1, shews also a case of alteration of a list to cure a mistake by which a name was supposed to have been erased which was not erased, and the correction was maintained.

It is certain that Henry could not maintain an action against the returning officer for refusing to allow him to be voted for until his name was put in the poll book, because in such an action malice must be alleged and proved, and as the candidates name was not on the certified list of the clerk, malice could not be presumed against the returning officer: *Tozer* v. *Child*, 7 E. & B. 377.

The clerk on the day after the nomination is to post up in his office the names of the persons proposed for the respective offices. This I should think was directory only, and if he did it the second day after the nomination, an election had upon it would not be avoided.

The clerk is also to provide the returning officer of each division with a certified list of the names of such candidates, specifying the offices for which they are respectively candidates. No time is named when these certified lists are to be provided. No doubt it must be sometime before the polling day, for the clerk is also to provide the returning officer with a poll book, and he or his clerk shall enter therein in separate columns the names of the candidates proposed and seconded at the nomination; all of which must be done of course before the voting begins.

It may be presumed the returning officer is to take his information from the certified list of the clerk as to the persons who were the candidates that were proposed and seconded at the nomination. But the act does not say so. I should think the returning officer could not properly insert any name on the clerk's list of his own authority, or any name

in the poll book which was not in the certified list, but perhaps if he had no certified list at all he might insert the candidates names in his poll book notwithstanding the clerk's neglect; *Seale* v. *The Queen*, 8 E. & B. 22.

What the returning officer did in this case he may be presumed, from the affidavits, to have done with the clerk's assent, and I think the clerk could then have corrected his certified list.

While I think the election should not be avoided, I do not think the proceedings have been taken without just and reasonable cause for contesting the legality of the proceedings, and although I give judgment against the relator it must be without costs.

Summons discharged without costs.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

Conroy v. Pearson.

A writ of summons is returnable on the day of its service.

[Chambers, February 20, 1868.]

This was a summons to set aside a declaration with costs, on the ground that the plaintiff did not declare within one year after the writ of summons was returnable.

The writ of summons issued 8th February, 1867, and served 12th February, 1867: appearance entered 20th February, 1867: declaration dated and filed 8th February, 1868, and served 13th February, 1868.

Osler showed cause, and contended that the writ must be considered as returnable when the time for appearance expired, namely, the 22nd February, 1867; and, if so, the declaration was filed and served within the year: *Hodgson* v. *Mee*, 8 A. & E. 765; *Barnes* v. *Jackson*, 1 B. N. C. 545; Tidd's Prac. 166; Harrison's C. L. P. Act, 132.

C. W. Paterson contra. The writ was returnable on the 12th February, 1867, the day of its service: *Eadon* v. *Roberts*, 9 Exch. 227; *Patterson* v. *McCollum*, 2 U. C. L. J. N. S. 70; *Wallace* v. *Frazer*, 2 U. C. L. J 184; *Tyson* v. *McLean*, 1 U. C. Prac. Rep. 339; *Swift* v. *Williams*, 5 U. C. L. J. 252; Arch. Prac. 11th edn. 157–187; Lush's Prac. 399.

Adam Wilson, J.—In a matter of this kind, it is of no consequence what the decision may be, so long as it is settled for guidance in future cases. In Arch. Prac. 157, it is said, "The writ of summons does not specify any particular return day, and the return day is now considered the day of the service of the writ on the defendant."

The C. L. P. Act, sec. 81 declares that "a plaintiff shall be deemed out of Court unless he declares within one year after the writ of summons or capias is returnable."

The summons was returnable in my opinion on the day of its service, the 12th February, 1867. The plaintiff should have filed *and served* his declaration therefore on the 11th February, 1868, (See C. L. P. Act Sec. 842). Instead of doing so, he did not completely declare till the 13th of February, when he served his declaration.

The order must go. *Summons absolute.*

Watson et al v. Brewer.

Ejectment—Particulars of claim—At what stage.

A defendant is entitled to particulars of a plaintiff's claim in an action of ejectment after appearance, or at any other stage, if it appear proper to a judge that he should have them.

[Chambers, Feb. 20, 1868.]

In an action of ejectment, the notice claimed title by reason of the forfeiture by non-observance of the covenants on the part of defendant, contained in a lease of the land from plaintiff to defendant.

The defendant appeared, and denied the plaintiff's title to eject him from the lands by reason of such forfeiture, and he asserted title in himself by virtue of such lease.

The defendant then applied for particulars of the alleged forfeiture, which was opposed on the ground that it was too late for him to ask for particulars of his appearance.

Adam Wilson, J.—The question is whether the defendant should or could have applied for particulars before appearance, and whether he is still in time in his application.

In Arch. Pr. 11th ed. 1039, it is said, "where the ejectment is brought for a forfeiture by breaches of covenants, &c., a judge upon summons, will order the plaintiff to give the defendant, after appearance entered, a forfeiture of the covenants and breaches, &c., on which the forfeiture is founded."

As a general rule, the defendant cannot take any step in the action without entering an appearance, Arch. Pr. 11th ed. 216. But by our rule, No. 21, following the English rule, particulars may be ordered before appearance. It is also laid down in Arch. Pr. 1441, that it is discretionary with the judges, to make an order for particulars at any time before trial. In the Queen's Bench, the old practice was to give particulars before appearance, not so in the Common Pleas; but the latter court afterwards adopted the practice of the former: Tidds Pr. 9th ed. 596.

It is said to be laid down in Arch. Prac, 12th ed., 1554, that particulars of breaches in ejectment, cannot be given after appearance. (I have not seen this edition, as it has been abstracted from the Osgoode Hall library, as many others of the new editions of such useful practical works have been, by those who are obliged to be trusted with them. This conduct has been pursued so systematically for many years past, and always upon the latest and best editions, that the taking cannot be supposed to be from mere forgetfulness. The concern is whether it is by any of those who are qualifying for the practice of the law, or, of those who are practising it. The habit is so persistent and notorious, that it is felt to be a scandal in the profession.)

I do not think a defendant can be prevented from getting particulars because he has appeared in ejectment, more than in other actions; nor do I think a judge might not order them at any time, if it appeared to be proper that the defendant should have them. The defendant swears that "he does not know upon what grounds the plaintiffs claim to eject him from the land in question."

The order must be granted.

Order accordingly.

In re Trueman B. Smith.

Extradition—Counterfeiting—Forgery.

A prisoner was arrested in Upper Canada for having committed in the United States "the crime of forgery, by forging, coining, &c,, spurious silver coin," &c.

Held, 1. That the offence as above charged does not constitute the crime of "forgery" within the meaning of the Extradition Treaty or Act.

2. That it certainly is not the crime of forgery under our law, and therefore the prisoner could not be extradited.

Definition of the term "forgery" considered.

[Chambers, March 3, 1868.]

This was an application by a prisoner to be discharged on a writ of *habeas corpus*, on the ground that the charge under which he was in custody was not within the Extradition Treaty or the Act of Canada giving it effect.

The charge or complaint was, that "Smith at the Town of Toledo, —— County, State of Iowa, on or about the 21st March, 1867, did commit the crime of forgery by forging, coining, counterfeiting, and making spurious silver coin of the stamp and imitation of the silver coin of the United States of America of the denomination of 5 and 10 cent pieces, with implements and materials which he produced for the purpose of carrying on the business of coining such spurious money."

Jas. Patterson showed cause for the Crown, referring to Con. Stat. Can. cap. 89; 2 *Bishops* Criminal Law, secs. 432, 434, 435 and 451; 5th Rep. Crim Law Com., A.D. 1840, p. 69; 3 Inst. 169 (*per* Lord Coke); 2 Bl. Com. 247; 2 East P. C. 852; *Rex.* v. *Coogan*, 2 East P. C. 853; *Rex.* v. *Jones*, 1 Leach, 4th ed. 775, 785; *Reg.* v. *Anderson*, 20 U. C. Q. B. 124; *In re Windsor*, 6 New Rep. 96.

Curran, contra, for the prisoner. By Con. Stat. Can. cap. 89, the crime charged must be a crime by the law of the country where prisoner arrested, and this prisoner was arrested in Upper Canada (see also *Re Windsor*, 34 L. J. N. S. 163). As to the meaning of forgery, and that it does not cover cases of coining, see 4 Com. Dig. 406 *et seq*, and Tomlin's Law Dict.

Adam Wilson, J.—The Statute of Canada (cap. 89) applies to the crimes of murder, or assault to commit murder, piracy, arson, robbery, *forgery, or the utterance of forged paper*, committed within the jurisdiction of the United States (see also 24 Vic. c. 6); and the question is, whether the charge above stated as explained of forging and counterfeiting spurious silver coin, &c., constitutes the offence of forgery within the meaning of the treaty and statute?

I am of opinion it does not; it is unquestionably not forgery by our law here; nor from the evidence given can I assume it to be forgery according to the law of the State of Iowa, or of the United States of America, if that would make any difference. The statute declares that the offence charged must be such as would, according to the laws of this Province, justify the apprehension and committal for trial of the person accused, if the crime charged had been committed here; so that if not an offence of the character charged according to our law, the person is not to be apprehended, committed or delivered over to the foreign government; no comity shall prevail in such a case: *In re Windsor*, 6 New Rep. 96; 10 Cox. C. C. 118; 11 Jur. N S. 807

Forgery is defined in 4 Bl. Com. 247, to be "the fraudulent making or alteration of a writing to the prejudice of another man's right;" and this is substantially the definition accepted and approved of in *Reg.* v. *Smith*, 1 Dearsley & Bell, 566, in which counsel have arrayed the definitions of different authors of this offence, to which may be added, Bac. Abr. "Forgery."

Hawk. P. C., in Book 1, c. 70, sec. 1, it is described to be "an offence in falsely and fraudulently making or altering any matter of record or any other authentic matter of a public nature, as a parish register or any deed or will"

In *Reg.* v. *Closs*, 1 Dearsley & Bell, 460, Cockburn, C. J, said, "a forgery must be of some document or writing," and therefore putting an artists name on the corner of a picture in order to pass it off as an original picture by that artist was held not to be forgery.

There is no case where the making of false coin has been determined to be forgery, and it is not so by our statute.

Such an offence is here a misdemeanour for the first act and a felony for the second, but it is not the offence of forgery at all.

The decision of *Re Dubois, otherwise Coppin*, 12 Jur. N. S. 867, shews that this is the mode in which the treaty and statute are to be interpreted, and our own statute reciting the treaty is almost conclusive evidence that the "forgery" referred to is the offence of that name well understood in the United States and in this Province, and, to make it plainer, it relates also to "the utterance of forged paper"

The prisoner must be discharged.

Prisoner discharged.

ENGLISH REPORTS.

COMMON PLEAS.

Nosotti v. Hudson.

Practice—Extension of time for setting down cause—15 & 16 *Vict. c.* 76, *s.* 101.

By the 101st section of the Common Law Procedure Act, 1852, a judge may extend the time for proceeding to trial. This power is discretionary with him, and he may exercise it after the twenty days' notice given by the defendant, under the same section, to bring the issue on for trial, has expired.

[16 W. R. 315, Jan. 17 1868.]

This was an action for dilapidation, in which notice of trial at the next Westminster sittings was originally given by the plaintiff on the 6th of April, 1867. This notice was, however, countermanded and continued from time to time; and as the plaintiff failed to bring on the issue to be tried, the defendant, on the 23rd of November last, gave the plaintiff the twenty days' notice required by the 101st section of the Common Law Procedure Act, 1852, for bringing the issue on at the next sittings, after the expiration of such notice. On the 3rd of January the plaintiff gave the ordinary 10 days' notice of trial for the first sittings this term, but on the 13th of January the cause had not been set down. Thereupon the plaintiff took out a summons for leave to set down the cause, and on the 14th of January, Byles J., holding that his power to extend the time for proceeding to trial had not run out, made on order that the plaintiff should be at liberty to set down the cause

Littler now moved to set this order aside.—The question turns on the proviso at the end of the

101st section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which provides "that the Court or a judge shall have power to extend the time for proceeding to trial with or without terms." But the application was not made within the twenty days given by the defendants notice for bringing on the issue to be tried, and the learned judge therefore could not extend that which did not exist. Martin, B., expressly held so at chambers, after taking time to consider: *Horner* v. *Spencer*, 1 F. & F. 412; and that is the only decision on the point. In *Lord Ward* v. *Lumley*, 5 H. & N. 656, the Court of Exchequer allowed further time in an appeal under the 87th section of the Common Law Procedure Act, 1854, though the application was made after the four days limited for the notice of appeal had expired; and the Court of Queen's Bench, in *Wishart* v. *Fowler*, 4 B. & Sm. 674, held that the Court of Bankruptcy had power under the 194th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), to allow further time for registration of an arrangement deed, though the twenty-eight days limited for registration had elapsed; and there are decisions to the like effect on 3 & 4 Will. 4, c. 42. s. 39, enabling the Courts to enlarge the the time for making awards: but in all those cases the words of the Acts are different from those in the present case; they none of them have the word "extend."

Bovill, C. J.—I should be sorry to throw any doubt on the power of the judge to extend the time for proceeding to trial. Mr. Littler's observations would apply to the word "enlarge" as much as to the word "extend," and it has been expressly held that though an arbitrator cannot "enlarge" the time for his award after the expiration of the original time, the Court, under 3 & 4 Will. 4, c. 42, s. 39, may do so. The word "extend" I should think more extensive than "enlarge." As to *Horner* v. *Spencer*, a suggestion had been actually entered and judgment signed thereon: the report only states that the application should have been made within the twenty days, but as it does not set out the circumstances it is consistent with all that appears that my brother Martin may have only thought that under the circumstances the time should not be extended. Here my brother Byles no doubt acted with reference to the circumstances, and he had a discretion to do so.

Willes, J.—It is quite for the discretion of the judge, and we do not at all overrule my brother Martin

Keating and Montagu Smith, JJ., concurred.

Rule refused.

IRISH REPORTS.

COMMON PLEAS.

Jack v. Burne.

Practice—Garnishee—Order for payment in interpleader suit.

An order made in an interpleader suit, and entered as of record, according to the provisions of the 9 & 10 Vict. c. 64, s. 7, is a judgment within the meaning of the Common Law Procedure Act (Ireland) 1856, s. 63.

[C. P. (Ir.)—16 W. R. 367.]

This was an application on behalf of Joseph Kirkman and John Wilson, assignees for the benefit of certain creditors of the defendant Walter Burns, for a garnishee order to attach a debt due by him to David Jack and Thomas McFarlane, two creditors for whose benefit Kirkman and Wilson were not assignees. From the affidavits filed on behalf of the applicants, it appeared that David Jack and Thomas McFarland had obtained judgment in this cause for a sum amounting, together with costs, to about £30, which was still unsatisfied. Subsequently the defendant Walter Burne assigned all his estate and effects to Joseph Kirkman and John Wilson, for the benefit of his creditors; notwithstanding which, however, the plaintiffs, David Jack and Thomas McFarland, caused an execution to be issued, under which the goods of the defendant Walter Burne were sold by sheriff of the county of Down. In consequence of a claim having been put in on behalf of the creditors by Joseph Kirkman and John Wilson, the sheriff applied for and obtained an interpleader order, whereby an issue was directed to be tried, wherein Joseph Kirkman and John Wilson were plaintiffs, and David Jack and Thomas McFarland were defendants; and on the trial of the issue a verdict was had for the plaintiffs. An order was then obtained from Mr Justice Keogh, sitting in chambers, directing the sheriff to pay over the sum of £15, being the balance remaining in his hands out of the produce of the seizure and sale under the execution, to Joseph Kirkman and John Wilson, and the defendants David Jack and Thomas McFarland to pay to them their costs of the interpleader motion, and proceedings under the order thereon.

Weir in support of the application.—By the 9 & 10 Vict. c. 64, s. 7,* it is enacted that orders made in pursuance of the act may be entered of record "to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs by any such rule or order; and every such rule or order so entered shall have the force and effect of a judgment." It is submitted that the order in this case, which was entered of record as directed by the above enactment, is a judgment within the meaning of the 63rd section of the Common Law Procedure Act (Ireland), 1856.

Morris, J., on the case being mentioned on a previous day, directed the motion to stand until he should have had an opportunity of conferring with the other members of the court. On the application being renewed, the order was made.

UNITED STATES REPORTS.

SUPREME COURT.

Watson v. Muirhead.

A conveyancer, using ordinary diligence in examining and passing title, is not liable for want of skill.

Error to the District Court for the city and county of Philadelphia.

Opinion by Sharswood, J.

The business of a conveyancer is one of great importance and responsibility. It requires an

* Corresponding to 1 & 2 Will. 4, c. 58, English, and compare our Con. Stat. U. C. cap. 30 sec. 14.—Eds. L. J.

acquaintance with the general principles of the law of real property and a large amount of practical knowledge, which can only be derived from experience In England it has been pursued by lawyers of the greatest eminence. As our titles become more complex, with the increase of wealth, and the desires which always accompany it to continue it in our name and family as long as the law will permit, it will become more and more necessary that gentleman prepared by a course of liberal education and previous study should devote themselves to it. There have been and still are such among us. The rule of liability for errors of judgment as applied to them ought to be the same as in the case of gentlemen in the practice of law or medicine. It is not a mere art but a science. "That part of the profession," said Lord Mansfield, "which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error; and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake. * * * * * A counsel may mistake as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged. * * * Not only counsel but judges may differ, or doubt, or take time to consider. Therefore, an attorney ought not to be liable in case of a reasonable doubt." *Pitt* v. *Yalden*, 4 Burr. 2060. The rule declared by Lord Mansfield has been followed in all the subsequent cases. "No attorney," said C. J. Abbott, "is bound to know all the law; God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into." *Montriou* v. *Jeffreys*, 2 C. & P. 113, and see *Godefroy* v. *Dalton*, 6 Bing. 460; *Kemp* v. *Burt*, 4 B. & Ad. 424; *Gilbert* v. *Williams*, 8 Mass. 51.

If the defendant had undertaken to act upon his own opinion that the judgment, which appeared on the searches, was not a final one, and, therefore, not a lien upon the ground rent, the title of which it was his duty to examine, could we say that, before the decision of this court in *Sellers* v. *Burk*, 11 Wright, 334, the mistake was one, which could only result from the want of ordinary knowledge and skill or the failure to exercise due caution? But when in addition it appears that having been previously employed to investigate the same title, he had submitted it to eminent counsel, who had given a written opinion in its favour without even expressing a doubt as to the judgment in question, to hold him responsible would be to establish a rule, the direct effect of which would be to deter all prudent and responsible men from pursuing a vocation environed with such perils. We think the court below was right in refusing to charge as requested in the plaintiffs's points; all of which assume as matter of law that to pass the title with such an incumbrance upon it was evidence of want of ordinary knowledge and skill and of due caution. We see therefore no error for which we ought to reverse.

Judgment affirmed.

—*Philadelphia Legal Intelligencer.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF AUGUST, SEPT. & OCT. 1867.

(*Continued from page 20, Vol. IV. N.S.*)

Action.—*See* Contract, 1; Directors, 1; Highway, 2.

Admiralty.

1. By 24 Vic. c. 10, s. 4, the Admiralty has jurisdiction over any claim for building a ship, if, at the time of the institution of the cause, the ship is under arrest of the court. After the building, but before the arrest, of a ship, the plaintiffs, the builders, assigned their claim to A.; they afterwards executed a composition deed for the benefit of their creditors. The ship having been arrested, it was *held*, that the plaintiffs could sue, as trustees for A., notwithstanding the composition deed; since the assignment to him carried with it all rights of action, which, though inchoate at the time, might subsequently become complete. — *The Wasp*, Law Rep. 1 Adm. & Ecc. 367.

2. Plaintiffs beyond the jurisdiction of the court, in a cause of possession, though liable to give security for costs, will not be required, as a general rule, to give security for damages.— *The Mary or Alexandra*, Law Rep. 1 Adm. & Ecc. 335.

See Collision; Priority, 2, 3; Ship, 1.

Adultery.—*See* Marriage.

Agent.—*See* Principal and Agent.

Agreement.—*See* Contract.

Appeal.—*See* Equity Pleading and Practice, 3.

Arbitration.—*See* Award.

Assignment.—*See* Admiralty, 1.

Attachment.—*See* Foreign Attachment.

Award.

A statute directs that an arbitrator shall make his award within a certain time after he "shall have entered on the reference." *Held*, that an arbitrator enters on a reference, not when he accepts the office, or gives notice of his intention to proceed, but when he enters into the matter of the reference, either with parties before him or *ex parte*.—*Baker* v. *Stephens*, Law Rep. 2 Q. B. 523.

Bankruptcy.

1. *Semble*, That the rule that securities held by a banker against his acceptances are available to the bill-holders, if both acceptor and drawer are insolvent, does not apply where the drawers owe the acceptors more than the

amount of the bills, at least if the acceptors have a general lien on securities deposited with them.—*Hickie & Co.'s case*, Law Rep. 4 Eq. 226.

2. A trader, being indebted to the defendant, gave him his acceptance for the amount due. Three days before the acceptance was due, he agreed to give the defendant a bill of sale of all his goods, in consideration of the defendant taking up the acceptance, and in order to cover any further advance by the defendant. The defendant took up the acceptance, and afterwards advanced the trader a further sum. The bill of sale was subsequently executed, whereby all the personal estate of which the trader was or should in future become possessed was assigned to the defendant as security. Less than a year after the date of this bill of sale, but more than a year after the date of the agreement to give it, the trader was adjudicated bankrupt. In trover for the goods by the assignee: *Held*, that the bill of sale gave the defendant a good title as against the plaintiff, both as to the goods acquired before and after the date of the agreement.—*Mercer* v. *Peterson*, Law Rep. 2 Ex. 304.

3. A. delivered to B. a policy of insurance on his own life, as a security for a loan, intending to give B. an interest in the sum insured. No notice of the transaction was given to the insurance office. *Held*, that the policy remained in the order and disposition of A., and that on his bankruptcy his assignee could recover it from B.—*Green* v. *Ingham*, Law Rep. 2 C. P. 525.

4. A. transferred to B., as security for a debt, certain shares in a mine, and covenanted to indemnify B. from all liabilities that might accrue in respect of the shares. A. became bankrupt, and B. was compelled, as shareholder, to pay debts of the company which had accrued before A.'s bankruptcy. *Held*, that B. was not a "surety, or liable for any debt of the bankrupt," nor was A.'s liability under the covenant "a liability to pay money on a contingency" within the 12 & 13 Vic. c. 106, ss. 173, 178; and that therefore A.'s liability on the covenant was not barred by his discharge in bankruptcy.—*Betteley* v. *Stainsby*, Law Rep. 2 C. P. 568.

See Partnership; Priority, 1.

Bastardy.

A dismissal of a bastardy summons on the merits is no bar to a second application, if the dismissal was obtained on false evidence.—*The Queen* v. *Gaunt*, Law Rep. 2 Q. B. 466.

Bill of Lading.

A *bona fide* assignee for value of a bill of lading is entitled to the goods named therein, if he had no notice of fraud or insolvency in the person assigning to him, and if such person had authority to transfer the bill of lading.—*The Argentina*, Law Rep. 1 Adm. & Ecc. 370.

Bills and Notes.

Declaration on the common counts. Plea, that the defendant, with the plaintiffs' consent, had delivered a note on account of the debt to C., who still held it. Replication, on equitable grounds, that C., at the time of the delivery, had been and still was a trustee of the plaintiffs, who were alone beneficially interested in the note, of which the defendant had notice and that the note was overdue and unpaid. *Held*, a good replication. — *National Savings Bank* v. *Tranah*, Law Rep. 2 C. P. 556.

See Bankruptcy, 1; Company, 2.

Bond.—*See* Principal and Surety; Priority, 3.

Bottomry Bond.—*See* Priority, 3.

Charity.—*See* Mortmain.

Charter Party.

1. A charter party provided that the ship should proceed to Sulinah, and there load a full cargo of grain; the cargo to be brought alongside the ship at the charterers' expense and risk; thirty days to be allowed for loading and unloading; detention by ice not to be reckoned as laying days. There are no storehouses at Sulinah; but the grain shipped there is kept at places higher up the Danube, is brought by lighters down the river, and is unloaded into the ships. Six days after the charterer had notice that the ship was ready to load, but before any cargo had been supplied, the river immediately above Sulinah became frozen over, and so remained for two months, the port itself remaining open. *Held*, that as from the c ir cumstances of the port the cargo had to be brought down the river after the arrival of the ship, "detention by ice" extended to detention of the lighters in the river, and the shipowner could not recover damages for the time the river above Sulinah was frozen. *Held*, also, that the shipowner's ignorance of the circumstances of the port did not affect the question, nor did the fact that the charterer by greater diligence might have loaded the ship before the river was frozen, as he was entitled to all the laying days.—*Hudson* v. *Ede*, Law Rep. 2 Q. B. 566.

2. By a charter party for a voyage the cargo was to be loaded and discharged with all dis patch, and freight to be paid on delivery; "the charterer's liability to cease when the cargo is shipped, if the same is worth the freight on arrival at the port of discharge; the captain

having an absolute lien on it for freight, dead-freight, and demurrage, which he, or owner, shall be bound to exercise." The cargo was shipped, and was worth the freight on arrival at the port of discharge. *Held*, that the charterer was not liable to the shipowner for delay in loading the vessel.—*Bannister* v. *Breslauer*, Law Rep. 2 C. P. 497.

3. The defendant chartered a ship to proceed to P., and there load "a full and complete cargo," "fire, &c.," as usual, excepted. After part of the cargo was on board, and while a part of the residue was lying alongside, the ship caught fire, the fire was put out by scuttling the ship, and the damaged cargo was necessarily sold by the master, who also forwarded by another ship the portion then lying alongside. After the ship had been repaired, she was tendered to the defendant, but he refused to load any more cargo. *Held*, that he was not exonerated from his obligation to load a full cargo.—*Jones* v. *Holm*, Law Rep. 2 Ex. 335.

See Freight.

Codicil.—*See* Will, 4.

Collision.

1. When a collision takes place in which both vessels are to blame, the master and crew of one cannot sue for salvage for having saved the cargo of the other from the perils resulting from the collision.—*Cargo ex Capella*, Law Rep. 1 Adm. & Ecc. 356.

2. If the crew of a ship have contributed to a collision by not keeping a sufficient lookout, though the pilot is also to blame, yet the owners are liable.—*The Velasquez*, Law Rep. 1 P. C. 494.

3. If a ship, bound to keep her course under the 18th sailing rule, justifies her departure under the 19th rule, she must show not only that her departure was necessary to avoid immediate danger, but that the course adopted by her was reasonably calculated to avoid that danger.—*The Agra and Elizabeth Jenkins*, Law Rep. 1 P. C. 501.

Company.

1. If an injury to an individual, caused by the act of a company, would not have been a ground for damages before the company obtained statutory powers to do what caused the injury, it cannot (except expressly so provided) be a ground for compensation when caused by something done in the exercise of those powers. R. was the occupier of a public house on a public footpath. A railway company, under its statutory powers, temporarily obstructed streets leading to the footpath, so as to make access to the house inconvenient. The jury found that R. had sustained damage by the interruption to his business. *Held* (per Lord Chelmsford, C.; and Lord Cranworth), that R. was not entitled to compensation.

Per Lord Westbury (dissenting).—The words of the statute, "injuriously affected," do not mean wrongfully in the sense of unlawfully, but "damnously," that is, injuriously, affected in the ordinary sense of the word; and trade carried on in particular premises is included in the "interest" of the occupier, and if injuriously affected is a subject of compensation.—*Ricket* v. *Metropolitan Railway Co.*, Law Rep. 2 H. L. 175.

2. A company was formed for the purpose of buying the right to make a foreign railway, and of forming a *société anonyme* to construct it. The memorandum and articles stated that the company might do whatever they thought incidental or conducive to the main object, and that the directors might do all things and make all contracts which, in their judgment, were necessary and proper to effect it. *Held*, that the right to issue negotiable paper, though not to be inferred from the nature of the company's business, was yet conferred by the general words in the memorandum and articles.—*Peruvian Railways Co.* v. *Thames and Mersey Marine Ins. Co.*, Law Rep. 2 Ch. 617.

See Contract, 2; Directors; Principal and Agent; Ultra Vires.

Composition Deed.—*See* Admiralty, 1.

Concealment.—*See* Insurance, 3, 4.

Condition.—*See* Sale.

Consideration.—*See* Contract, 2.

Contract.

1. Though a contract involving persona confidence is ended by the death of the party confided in, it is not so rescinded as to take away a right of action for instalments of pay already vested.—*Stubbs* v. *Holywell Railway Co.* Law Rep. 2 Ex. 311.

2. A company, already carrying the mails under contracts with the government of New Zealand, issued a prospectus, offering to issue "new shares, in order to enable the company to perform the contract recently entered into with the government of New Zealand for a monthly mail service." K., induced by this statement, took some of the new shares. The contract alluded to in the prospectus had been made with the agent of the New Zealand government, both the company and the agent believed he had authority to make it; but it turned out that he had not, and the government repudiated it. *Held*, that as the misre-

presentation was innocent, it did not entitle K. to rescind his contract for shares, since it did not affect the substance of the matter, K. having got shares in the very company in which he had applied for them, and which shares were of considerable value. — *Kennedy* v. *Panama, &c., Mail Co.*, Law Rep. 2 Q. B. 580.

See Charter Party; Directors, 1; Sale; Ship, 2; Ultra Vires.

Corporation.—*See* Company.

Costs.—*See* Admiralty, 2; Equity Pleading and Practice, 3; Will, 2.

Covenant.—*See* Bankruptcy, 4; Ultra Vires.

Custom.

The owners of a fishery, had, since the reign of Elizabeth, granted for a reasonable fee licenses to fish, to all inhabitants of certain parishes who had served seven years' apprenticeship. In an action by one so qualified against the owners for not granting him a license on payment of the usual fee, *held*, that as every act of fishing had been by license, there had been no enjoyment as of right so as to give rise to a custom. *Semble*, that it is no objection to a custom that it requires a reasonable fee, and not a fee of fixed amount.—*Mills* v. *Mayor, &c., of Colchester*, Law Rep. 2 C. P. 476.

Damages.—*See* Admiralty, 2; Charty Party, 1; Company, 1; Highway, 2; Ship, 2; Slander.

Dedication.—*See* Highway, 1.

Deed.

A., owning an undivided moiety of a messuage in R. Street, in fee, and having a lease of the other moiety with a covenant not to assign without license, by deed, reciting that he was seized in fee of the messuage in R. Street, and was also possessed of two leaseholds, one in N. Street, the other in C. Street, mortgaged in fee all his estate and interest in the messuage in R. Street, in the most general words, and also granted to B. an underlease of the premises in C. Street, and covenanted to assign to B. the premises in N. Street, as security for a debt. *Held*, that the undivided moiety in fee which A. had in the messuage in R. Street alone passed by the deed, and not his leasehold interest in the other moiety.—*Francis* v. *Minton*, Law Rep. 2 C. P. 543.

See Insurance, 1.

Devise.

1. If an estate is given to A. for life, and the remainder to the "issue" is accompanied by words of distribution, and by words which would give an estate in fee or tail to the issue, A. has only a life estate, and this whether the estate in fee or tail to the issue is given expressly or by implication.

By will made in 1806, the testator gave lands to A. for life, and after his death "to the use of all and every the issue, child, or children of A., in such shares, manner, and form as A. shall appoint;" and "in default of such issue" over. *Held*, that as A. had power to appoint to his children in fee, they would take by implication, in default of appointment, an estate in fee, and that therefore A. had a life estate only.—*Bradley* v. *Cartwright*, Law Rep. 2 C. P. 511.

2. Devise of house to my nieces, L. and E., and to their children, and, if they have none, to W. and his children, "the furniture to go with the house." Neither of the nieces had any children at the date of the will. *Held*, that the gift of the furniture was a sufficient reason for not vesting estates tail in the nieces, and that they took the house and furniture for their lives, with immediate remainders to the children of each. — *Grieve* v. *Grieve*, Law Rep. 4 Eq. 180.

See Legacy; Trust, 1; Will, 4.

Directors.

1. Where a person who has been drawn into a contract to purchase shares by the fraudulent misrepresentation of directors, brings a suit to rescind the contract, the misrepresentations are imputable to the company. But if such person, instead of seeking to set aside the contract, sues for damages for deceit, he can maintain such action only against the directors, and not against the company. — *Western Bank of Scotland* v. *Addie*, Law Rep. 1 H. L. Sc. 145.

2. If the articles of a company do not prescribe how many directors shall be a quorum, the number who usually act in conducting the business will be a quorum. A forfeiture of shares by two out of six directors held valid.—*Lyster's case*, Law Rep. 4 Eq. 233.

Discovery.—*See* Production of Documents.

Distress.—*See* Landlord and Tenant, 1.

Divorce.—*See* Husband and Wife.

Domicil.—*See* Residence.

Easement.—*See* Way.

Ecclesiastical Law.

The consecration of a church extends to the vaults beneath. The officiating clergyman need not stand on consecrated ground while performing the burial service.—*Rugg* v. *Kingsmill*, Law Rep. 1 Adm. & Ecc. 343.

Entry.—*See* Landlord and Tenant, 1.

Equity.—*See* Injunction.

Digest of English Law Reports.

Equity Pleading and Practice.

1. The United States of America can sue in that name in the English chancery without putting forward any public officer who could be called on to give discovery on a cross-bill. — *United States of America* v. *Wagner*, Law Rep. 2 Ch. 582.

2. An order of revivor, obtained by one defendant after the death of another defendant subsequently to decree, is irregular, unless notice has been given to the plaintiff, even though the plaintiff is a trustee having no substantial interest in the suit.—*Stratford* v. *Baker*, Law Rep. 4 Eq. 256.

3. The court of appeal in chancery agreeing with the conclusion of the court below, but disagreeing with the reasons given for it, the appeal was dismissed without costs.—*Peruvian Railways Co.* v. *Thames and Mersey Marine Ins. Co.*, Law Rep. 2 Ch. 617.

Estate Tail.—*See* Devise.

Estoppel.—*See* Bastardy; Landlord & Tenant, 2.

Evidence.

When a deceased person is proved to have stated that A. was her sister, she is to be presumed to have meant that A. was her legitimate sister, unless something appears to the contrary.—*Smith* v. *Tebbitt*, Law Rep. 1 P. & D. 354.

See Highway, 1; Marriage; Production of Documents; Will, 1.

Foreign Attachment.

Foreign attachment cannot be maintained in the Lord Mayor's court, where no one of the parties is a citizen or a resident in London, and where neither the debt of the original debtor nor that of the garnishee arose in the city.—*Mayor, &c., of London* v. *Cox*, Law Rep. 2 H. L. 239.

Foreign State.—*See* Equity Pleading and Practice, 1.

Forfeiture.

A testator appointed some and devised other real estate to his wife for life, and immediately after her death to his son, with a proviso that, if his wife should do any thing whereby she should be deprived of the control over the rents and profits, so that her receipt alone should not be a sufficient discharge for the same, her estate should determine as effectually as it would by her actual decease. The widow married again, without making any settlement. *Held*, that her interest was forfeited, and that the remainder in the appointed as well as in the devised estates was accelerated.—*Craven* v. *Brady*, Law Rep. 4 Eq. 209.

Freight.

1. A. chartered a ship from a foreign port home with a full cargo, but, he not being able to supply the cargo, the owners agreed to cancel the charter party and seek another cargo, on A. guaranteeing a "sum of £900 gross freight home." The owners procured a cargo whose estimated freight would have been £556, but the ship was lost on the voyage. *Held*, that the owners could recover from A. the difference between the estimated and guaranteed freights. — *Carr* v. *Wallachian Petroleum Co.*, (Exch. Ch.), Law Rep. 2 C. P. 468.

2. By a charter party it was agreed that a ship should sail to B., there load a full cargo of cotton, proceed with it to L., and deliver the same, on being paid freight at "75s. per ton of 50 cubic feet delivered, the freight to be paid on delivery." The ship received at B., and carried to L, a full cargo of cotton, which was packed, as is customary, in compressed bales, and expanded greatly on being unloaded. *Held*, that freight was payable on the measurement when shipped (Exch. Ch.). — *Buckle* v. *Knoop*, Law Rep. 2 Ex. 333.

Garnishee.—*See* Foreign Attachment.

General Words.—*See* Company, 2; Deed.

Gift.—*See* Trust, 2.

Guaranty.—*See* Freight, 1.

Highway.

1. To prove that a way was public, evidence was given of acts of user extending over seventy years, but all the time the land crossed had been on lease. The judge told the jury that they might, if they thought proper, presume from these acts a dedication by the defendant or his ancestor at a time prior to the lease. *Held*, no misdirection.—*Winterbottom* v. *Lord Derby*, Law Rep. 2 Ex. 316.

2. In an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed several times in passing along it, and being obliged, in common with every one else attempting to use it, either to go by a less direct way or to remove the obstructions. *Held*, that he could not maintain the action.—*Ib.*

Husband and Wife.

At the date of a decree of dissolution of marriage, the wife was entitled to a reversionary interest in a sum of stock, which had been the subject of a post-nuptial settlement. Afterwards the fund fell into possession; but before the divorced wife actually recovered it, she died. *Held*, that the rights of the husband depending on the marriage contract, ceased at the date of decree, and that the executors of the divorced

wife were entitled to the fund.—*Wilkinson* v. *Gibson*, Law Rep. 4 Eq 162.

See Forfeiture; Marriage; Trust, 2; Will, 5.

Injunction.

A bill was filed to restrain a railway company from placing an obstruction, partly on a public way and partly on the land of the plaintiffs, a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury caused by the continuance of the obstruction would be irreparable, and that the act was done without any color of title. On demurrer, *held*, that this was a case in which the court would enjoin trespass by a stranger.—*London & N. W. Railway Co.* v. *Lancashire & Yorkshire Railway Co.*, Law Rep. 4 Eq. 174.

Insurance.

1. A policy, purporting to be "signed, sealed and delivered," binds the insurers, though it remains in their possession. The insured need not formally accept or take it away, if nothing else remains to be done by him. So, *held*, by the House of Lords (Lord Chelmsford, C.; and Lord Cranworth), reversing the decision of the Courts of Exchequer Chamber and Common Pleas.—*Xenos* v. *Wickham*, Law Rep. 2 H. L. 296.

2. An insurance broker, employed to procure a policy, has no implied authority to direct the insurers to cancel it.—*Ib.*

3. The plaintiff in Liverpool employed an agent in Smyrna to buy and ship goods. The agent shipped goods on a vessel which sailed January 23, but was stranded the same day. The cargo became a total loss. The agent learned the loss on January 24, and on the next post day informed the plaintiff of it by letter, but purposely abstained from telegraphing, in order that the plaintiff might not be prevented from insuring. The plaintiff, on January 31, without any knowledge of the loss, effected an insurance. *Held*, that he could not recover against the underwriters.—*Proudfoot* v. *Montefiore*, Law Rep. 2 Q. B. 511.

4. In May, 1864, the Confederate cruiser, the Georgia, put into Liverpool, where she was dismantled; this fact was then known to the defendant, an underwriter at London. At Liverpool she was bought by the plaintiff, and converted into a merchant vessel. In August, 1864, the plaintiff, through a broker, insured the vessel with the defendant. The particulars furnished by the plaintiff were: Georgia, SS., chartered on a voyage from Liverpool to Lisbon and back. The vessel sailed, and was immediately captured by a United States frigate. In an action on the policy, the defendant set up the concealment of the fact that the Georgia was the late confederate cruiser, and therefore liable to capture. The jury found that the defendant did not know that the Georgia, which he was insuring, was the Confederate cruiser; but that he had, at the time of insuring, abundant means of identifying the ship from his previous knowledge, coupled with the particulars given by the plaintiff. *Held*, that the defendant was entitled to a verdict.—*Bates* v. *Hewitt*, Law Rep. 2 Q. B. 595.

See Bankruptcy, 3; Stamp, 1.

Interest.—*See* Vendor and Purchaser of Real Estate.

Joint Tenancy.—*See* Will, 3.

Jurisdiction.—*See* Foreign Attachment; Prohibition.

Landlord and Tenant.

1. An entry to distrain by opening a window which is shut but not fastened, is illegal. A., the landlord's agent, went with a warrant of distress to the demised premises, the front door of which he found fastened. Later in the day, a man in the employ of the landlord was allowed by the tenant to enter at the front door, and go through another door into the area, in order to repair the grating over the area, which was in a dangerous state. While the repairs were going on, the tenant left the house, having fastened both doors, and the man could not get out of the area. A. suggested to him to try a closed window which opened on the area. The window was unfasteeed; the man pulled down the sash, got into the house, and unfastened the door from the inside. A. then entered and distrained. *Held*, that it was one transaction, and the distress was unlawful.—*Nash* v. *Lucas*, Law Rep. 2 Q. B. 590.

2. A. let land to B. as tenant from year to year. B. continued to hold for several years after A.'s title had determined, paying rent to A., and at length gave up possession on notice to quit from A. After the determination of A.'s title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. held, but afterwards paid rent to no one. In ejectment by A. against C., after B. had given up possession, *held*, that it might be presumed, as matter of fact, that a new tenancy from year to year had been commenced by B. after A.'s title had ceased, and that C., therefore, could not dispute A.'s title.—*London and N. W. Railway Co.* v. *West*, Law Rep. 2 C. P. 553.

Lease.—*See* Landlord and Tenant, 2; Mortmain, 2; Watercourse.

Legacy.

1. A testatrix by will appointed her real and personal estate to trustees on trust to sell part, and hold the proceeds and all the trust moneys and personal estate on trust to pay the legacies thereinafter given; and after payment thereof, to pay an annuity to P. for life, unless he should become entitled to the legacy thereinafter mentioned, and subject thereto in trust for H. for life, and after her death in trust for her children, and if no chidren, in trust, to sell the estates not already sold, and out of the proceeds to pay to P., his executors, administrators and assigns, the sum of £20,000 in lieu of the annuity, and hold the residue in trust for the children of G. P. died before H., and on H.'s death the real estate then remaining unsold was insufficient to raise £20,000. *Held* (1), that the legacy was payable to P.'s representative; (2) that it was a demonstrative legacy, and payable out of the general estate.—*Hodges* v. *Grant*, Law Rep. 4 Eq. 140.

2. Testator, after giving several sevenths of his personal estate to his living brothers and sisters "and their heirs and assigns" respectively, gave another seventh "to the heirs and assigns of my late sister D., now deceased." *Held*, that the persons entitled to this last seventh were the statutory next of kin of D. at her death.—*Newton's Trusts*, Law Rep. 4 Eq. 171.

See Devise, 2; Mortmain; Trust, 1; Will, 3, 4.

Libel.—*See* Slander.

License.—*See* Custom.

Marriage.

In Scotland, a connection commencing in adultery may become, on the parties becoming at liberty to marry, matrimonial by consent, and habit and repute are evidence of such consent.—*The Breadalbane Case*, Law Rep. 1 H. L. Sc. 182.

See Forfeiture.

Married Woman.—*See* Husband and Wife.

Marshalling of Assets.—*See* Priority, 3.

Master.—*See* Priority, 3.

Master and Servant.—*See* Principal and Agent.

Misrepresentation. — *See* Contract, 2; Directors, 1; Insurance, 3, 4.

Mortgage.—*See* Priority, 2.

Mortmain.

1. A legacy charged on land, while unpaid, is within the Statute of Mortmain, and cannot be bequeathed by the legatee to a charity.—*Brook* v. *Badley*, Law Rep. 4 Eq. 106.

2. A. demised the minerals under certain lands in consideration of a surface rent and of a fixed sum, payable in half-yearly instalments till the whole was paid, with powers of distress and re-entry in default of payment. At A.'s death one instalment was due and unpaid. *Held*, that it was in the nature of rent, and not of unpaid purchase money, and could therefore be bequeathed by A. to a charity.—*Ib.*

Negligence.—*See* Collision, 2.

Notice.—*See* Priority, 1.

Nuisance.—*See* Highway, 2.

Parties.—*See* Equity Pleading and Practice, 1.

Partnership.

1. B., a banker, formed a partnership with M. and P., merchants, under the firm of M. & Co.; and by the partnership deed B. and M. mutually covenanted to bring £6,500 each into the business. There was a subsidiary agreement that B. should accept bills for the firm at a commission, and that the firm should negotiate them and keep B. in funds to meet the acceptances. B., M. and P. all became insolvent. M., on behalf of M. & Co., claimed to prove against B.'s estate for £5,000 due to the firm on their current account, and for £2,700 due to M. on the covenant in the deed for capital not brought in by B. *Held* (1) that the dealing between B. and M. & Co., was not such a separate trade as to allow the firm to prove against a partner's estate, and that the fact that all the partners were insolvent, and therefore had no personal interest, made no difference; (2) that the sum due on the covenant being due on account of the partnership, could not be proved by one partner against the estate of another, at least till the taking of the partnership accounts.—*Ex parte Maude*, Law Rep. 2 Ch. 550.

2. When one partner allows the other *bona fide* to carry on the business ostensibly as his own, on the bankruptcy of the latter, the dormant partner's share in the partnership stock in trade does not pass to the bankrupt's assignees, as in the possession, order or disposition of the bankrupt, as reputed owner, with consent of the true owner (Exch. Ch.).—*Reynolds* v. *Bowley*, Law Rep. 2 Q. B. 474.

See Stamp, 2.

Patent.

1. If the utility of a patent has not been tested by actual employment during fourteen years, a very strong presumption is raised against its utility, which can only be rebutted

by the very strongest evidence.—*In re Allan's Patent*, Law Rep. 1 P. C. 507.

2. A patentee, residing in America, gave his agent in England half the royalties. On an application for extension of the term of the patent, *held*, that in estimating the patentee's profits, such half was to be deducted.—*In re Poole's Patent*, Law Rep. 1 P. C. 514.

3. Under the 15 & 16 Vic. c. 83, s. 25, an extension may be granted of the term of a patent taken out first in England, though a patent has been obtained for the same invention in a foreign state, which would expire before the end of the extended term. *Secus*, if the patent was first obtained abroad by a foreign subject, and afterwards taken out in England.—*Ib.*

Payment.—*See* Bills and Notes.

Penalty.—*See* Vendor and Purchaser of Real Estate.

Pilot.—*See* Collision, 2; Ship, 1.

Pleading.—*See* Bills and Notes; Equity Pleading and Practice, 1, 2; Principal and Surety.

Power.—*See* Devise, 1; Forfeiture; Trust, 2.

Practice.—*See* Admiralty, 2; Equity Pleading and Practice; Prohibition; Probate Practice.

Precatory Words.—*See* Trust, 1.

Prescription.—*See* Way.

Presumption.—*See* Highway, 1; Landlord and Tenant, 2.

Principal and Agent.

1. A railway company agreed to carry A.'s horse free of charge. At the end of the journey, the station-master demanded payment for the horse, and on A.'s refusal gave A. in custody to the police, till it was ascertained that all was right. In an action by A. against the company for false imprisonment, *held*, that as the company would have had no power to detain A., even had he wrongly taken the horse on the train without paying, there was no implied authority from them to the station-master to do so, and that they were not liable.—*Poulton* v. *London and S. W. Railway Co.*, Law Rep. 2 Q. B. 534.

2. The defendant, with W. and others, undertook to form a company. At a meeting of the projectors, of which the defendant was chairman, it was resolved "that the prospectus, as marked with the chairman's initials, be approved, and be printed for circulation, at the discretion of W., as early as possible." W. employed the plaintiffs to print the prospectus, showing them the initialed copy, and saying he was authorized by the defendant to get it printed. The prospectus, when printed, was circulated by the defendant. There was an agreement, unknown to the plaintiffs, between the defendant and W., that W. should bear all expenses of forming the company. *Held*, that there was evidence from which a jury might infer that W. had authority to pledge the defendant's credit for the printing.—*Riley* v. *Packington*, Law Rep. 2 C. P. 536.

3. In an action by a bank against their late manager for improperly discounting bills for his own advantage, for the benefit of companies in which he was interested, it appeared that the transactions were in the ordinary course of business, that the manager had not exceeded his authority, and that no case of bad faith was proved against him. *Held*, that the action could not be maintained.—*Bank of Upper Canada* v. *Bradshaw*, Law Rep. 1 P. C. 479.

See Directors, 1; Insurance, 2, 3.

Principal and Surety.

To an action against sureties on a bond conditioned for the due performance by A. of his duties as collector of poor rates and of sewer rates for the parish of S., the bond to continue in force if A. held either office separately, the breach assigned being that A. had not paid over money received in each capacity, the defendants pleaded that before breach an act was passed increasing A.'s duties as collector of sewer rates, and under which he was also appointed collector of main drainage rates, by those from whom he held his other appointments. The act increased the proportion of sewer rates payable by S., and also imposed on the sewer rates some new small charges. *Held* (1), that A.'s appointment as collector of main drainage rates did not avoid the bond; (2) that the changes made by the acts did not amount to an alteration of the office of collector of sewer rates, and therefore did not avoid the bond; (3) that the plea was bad, as not affording an answer to the liability for A.'s breach of duty as collector of poor rates (Exc. Ch.).—*Skillett* v. *Fletcher*, Law Rep. 2 C. P. 469.

Priority.

1. A trustee learned the insolvency of his *cestui que trust* by reading in a newspaper an advertisement of a petition in insolvency, and he believed the advertisement to be true. The assignee gave no formal notice to the trustee till after A., who had taken a mortgage of the *cestui que trust's* interest, subsequently to the insolvency, had given formal notice to the trustee. *Held*, that A. was entitled to priority over the assignee in insolvency.—*Lloyd* v. *Banks*, Law Rep. 4 Eq. 222.

2. Mortgagees are to be paid in priority to material men who, at the time of supplying materials, are not in such actual possession of the ship as to give them a possessory lien.—*The Scio*, Law Rep. 1 Adm. & Ecc. 353.

3. A master gave a bottomry bond on ship, freight, and cargo, binding himself. The proceeds of the ship, which had been sold, and the freight were not sufficient to pay both the master's claim for wages and disbursements and the bondholder. The ship, freight, and cargo, were sufficient. The master had no lien on the cargo. *Held*, the owner of the cargo opposing, that, there being sufficient to pay the bondholder, the master's claim should have priority over the claim of the bondholder, thus marshalling the assets between them.—*The Edward Oliver*, Law Rep. 1 Adm. & Ecc. 379.

Probate Practice.—*See* Will, 1, 2.

Production of Documents.

A defendant cannot be required to produce documents relating to the compromise of a dispute between himself and one not a party to the suit.—*Warwick* v. *Queen's College, Oxford* (No. 2), Law Rep. 4 Eq. 254.

Prohibition.

One who is sued in an inferior court can bring an action of prohibition, before pleading in the inferior court, if the prohibition be sought on the ground of an absolute lack of jurisdiction in the inferior court.—*Mayor, &c., of London* v. *Cox*, Law Rep. 2 H. L. 239.

Promissory Note.—*See* Bills and Notes; Company, 2.

Railway.—*See* Company; Principal and Agent, 1; Ultra Vires.

Rent.—*See* Mortmain, 2.

Res Adjudicata.—*See* Bastardy.

Residence.

A surgeon in a lunatic asylum in the parish of N. married, and being required to live at the asylum, took lodgings for his wife in the parish of P.; he was in the habit of visiting her nearly weekly, staying from Saturday evening to Monday morning. *Held*, that he was resident in N. not in P.—*The Queen* v. *Norwood*, Law Rep. 2 Q. B. 457.

Reversion, Sale of.—*See* Vendor and Purchaser of Real Estate.

Revocation of Will.—*See* Will, 4.

Sale.

The defendant bought of the plaintiffs, at a certain price, "413 bales of wool, to arrive *ex Stige*, or any vessel they may be transhipped in, and subject to the wool not being sold in New York. The wool to be guaranteed about similar to samples in the broker's possession, and any dispute shall be decided by the brokers' whose decision shall be final." The wool turned out not about similar to sample, and the brokers, after protest from the defendant, awarded that the defendant should take it at a certain abatement. *Held*, that, as the contract was for the sale of specific goods, the guarantee was not a condition but only a warranty, that the brokers had power to award as they had, and the defendant was bound to take the wool accordingly.—*Heyworth* v. *Hutchinson*, Law Rep. 2 Q. B. 447.

Sale of Reversion.—*See* Vendor and Purchaser of Real Estate.

Salvage.—*See* Collision, 1.

Shelley's Case, Rule in.—*See* Devise, 1.

Ship.

1. The employment of a pilot is not compulsory on a vessel being towed from one dock to another in the port of Hull, as the vessel is neither passing "into or out" of the port, nor "bound to or from" the port within the Hull Pilot Act.—*The Maria*, Law Rep. 1 Adm. & Ecc. 358.

2. A. agreed with the master of a ship to serve as a sailor for twelve months. The ship was destined for the service of the Peruvian government. At Rio it became known that hostilities had broken out between Spain and Peru. The master was then acting under orders of a Peruvian agent on board, who received instructions from the commanders of two Peruvian war steamers, which had joined the ship on the voyage, and to which from time to time she had supplied coal and ammunition. A. objected to serve any longer, on the ground that the voyage had become illegal, and involved greater dangers than he had contracted to undergo. He accordingly left the ship, and sued the master for breach of contract. *Held* (per Kelly, C. B., and Martin and Pigott, B.B.; Bramwell, B., *dubitante*), that it was a breach of contract to employ A. on a voyage which would expose him to greater danger than he originally had reason to anticipate.

A., after leaving the ship, was imprisoned at Rio for some days as a Peruvian deserter; when released, the ship had gone, carrying off some of his clothes. *Held* (per Martin, Bramwell, and Channell, B.B.; Kelly, C. B., *dissentiente*), that damages for the imprisonment and loss of clothes were too remote to be recoverable.—*Burton* v. *Pinkerton*, Law Rep. 2 Ex. 340.

See Admiralty; Charter Party; Collision; Freight; Insurance, 3, 4; Priority, 2, 3.

Slander.

The declaration alleged that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes, that he was employed on the terms of his not doing so, and that a person killing foxes would not be employed as gamekeeper; that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes; special damage. *Held*, good, on demurrer, even without allegation of special damage.—*Foulger* v. *Newcomb*, Law Rep. 2 Ex. 327.

Stamp.

1. A case was stated on an alleged contract of insurance. It appeared that no stamped policy had been issued, and that the memorandum of insurance was also unstamped. For the purposes of the case, the parties agreed that a valid policy should be deemed to have been issued in accordance with the memorandum. The court ordered the case struck out, as they could not hear it without sanctioning an evasion of the stamp laws.—*Nixon* v. *Albion Marine Ins Co.*, Law Rep. 2 Ex. 338.

2. On a dissolution of partnership, a deed was made by which, after reciting that the share of A., the retiring partner, in the real assets of the firm should be taken by the remaining partners, and that A. should be allowed in account £17,000 as an equivalent for the value of his share. A., in consideration of £17,000, "part of the moneys and assets of the dissolved partnership to A. so allowed in account, appropriated, and paid as aforesaid," conveyed his share of the real assets to the remaining partners. *Held*, that the indenture was liable to an *ad valorem* stamp duty "as a conveyance upon the sale of property."—*Phillips* v. *Commissioners of Inland Revenues*, Law Rep. 2 Ex. 399.

Surety.—*See* Principal and Surety.

Tenancy in Common.—*See* Will, 3.

Trespass.—*See* Injunction.

Trust.

1. Bequest "of all my property to my husband, hoping he will leave it, after his death, to my son, if he is worthy of it," with the following explanation: "My reason for leaving all I have to dispose of to my husband, and in his entire power, is, that my son is already certain of a fortune, and that I cannot now feel any certainty what sort of character he may become. I therefore leave it to my husband, in whose honor, justice, and parental affection, I have the fullest confidence If my son dies before my husband, though I leave all without reservation to my dear husband to dispose of as he thinks fit, yet should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles, and clear judgment of right and wrong, and his sense of justice." *Held*, not to create a trust. —*Eaton* v. *Watts*, Law Rep. 4 Eq. 151.

2. Certain jewels were given on trust for such person as G. (a married woman) should, by writing, direct or appoint, and, in default of such appointment, on trust for G. during her life for her separate use, and to be at her absolute disposal, and her receipt, or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. *Held*, that G. could pass the absolute property in the jewels by gift and manual delivery without writing.—*Farington* v. *Parker*, Law Rep. 4 Eq 116.

See Priority, 1.

Ultra Vires.

A railway company, being about to apply to the legislature for an act empowering them to extend their line, covenanted with A., that if he would withhold his intended opposition to the act, they would, within three months after the passage of the act, pay him £2,000 for a personal compensation to him for the injury he had sustained, or might sustain, in respect of the preservation of game on his estate, in consequence of the construction of the intended railway. In an action on the covenant, *held*, in the Exchequer Chamber, reversing the decision of the Court of Exchequer (per Keating, Mellor, Montague Smith, and Lush, JJ.), that the covenant being absolute and not dependent on the construction of the railway, and the funds of the company being both by the original and the new act appropriated to special purposes, which did not include the consideration of the covenant, the covenant was *ultra vires*, and did not bind the company; (per Willes and Blackburn, JJ., dissenting), that the contract was not expressly, or by necessary implication, prohibited, and the company was therefore bound.—*Taylor* v. *Chichester and Midhurst Railway Co.*, Law Rep. 2 Ex. 356.

Vendor and Purchaser of Real Estate.

W. was entitled to the income of property subject to the payment of a life annuity to C., and of the interest on mortgages whereby the present income was reduced to a small amount. In consideration of the advance of £1,000, W. assigned the income as security for the payment of £3,300 on the death of C., redeemable on payment of £1,500 at the end of a year. Afterwards, by a memorandum, W. further

agreed to repay £400 and interest at 5 per cent a month, which security was to be tacked to the former security. *Held*, (1) that W.'s interest in the income was not a reversion, and therefore the transaction could not be set aside as a sale at an undervalue; (2) that the £500 additional, payable on redemption at the end of a year, was not a penalty; (3) that the security for £400 and interest was valid.—*Webster* v. *Cook*, Law Rep. 2 Ch. 542.

See Mortmain, 2.

Warranty.—*See* Sale.

Watercourse.

A lessor reserved "the free running of water and soil coming from any other buildings and lands contiguous to the demised premises through the sewers and watercourses made through the said premises." *Held*, that the reservation did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and therefore did not extend to the refuse of tan pits.—*Chadwick* v. *Marsden*, Law Rep. 2 Ex. 285.

Way.

A., being entitled by prescription to a right of way over B.'s land from field N., and the way to cart from field N. some hay stacked there, but grown partly there and partly on land adjoining. *Held*, that if A. used the way *bona fide* and for the ordinary and reasonable use of field N. as a field, the mere fact that some of the hay had not been grown on field N., did not make the carrying it over R.'s land an excess in the user of the right of way.—*Williams* v. *James*, Law Rep. 2 C. P. 577.

See Highway.

Will.

1. The party propounding a will must call one of the attesting witnesses to prove its due execution.—*Bowman* v. *Hodgson*, Law Rep. 1 P. & D. 362.

2. A testatrix, during her last illness, made a will in favour of two persons, strangers in blood. The instructions for the will were given to these persons, when no one else was present, and it was not read over to her. Her next of kin were denied access to her during her illness. The jury having found that the testatrix knew and approved of the contents, the will was pronounced for, but the costs of the unsuccessful opposition of the next of kin were ordered to be paid out of the estate.—*Goodacre* v. *Smith*, Law Rep. 1 P. & D. 359.

3. Property was given in trust for all the children of G. who should be living at the occurrence of a certain contingency, and the issue of such of the children of G. as should be then dead leaving issue, equally to be divided between such children and issue, but so that the issue of such children should take only such share as their respective parents, if living, would have been entitled to. *Held*, that the issue of deceased children of G. took as tenants in common, and not as joint tenants.—*Hodges* v. *Grant*, Law Rep. 4 Eq. 140.

4. A testator gave his residuary real and personal estate to trustees on trust for his "five sons," A., B., C., D. and E., as tenants in common, and by a codicil "revoked and made void all the trusts, clauses, matters, and things in his will, concerning his residuary estate, so far as the same trusts, &c., related to or affected his son E. or his right thereto or therein;" and "in lieu thereof" he gave £15,000 to the trustees on trust for E., his wife, and children; and if he, E., should have no children, he directed that "the said legacy" should sink into the residue, but so that E., or his representatives, should take no share or interest therein. *Held*, that the testator died intestate as to the trusts of one-fifth share of the residue, and that the £15,000 was not payable out of such share, but was payable before the residue was ascertained.—*Sykes* v. *Sykes*, Law Rep. 4 Eq. 200.

5. A testator directed that his daughters' share should "be settled on themselves strictly." *Held*, that the income of each daughter's share should, during the joint lives of herself and her husband, be paid to her without power of anticipation; if she died first, the share to go as she should by will appoint, and, in default of appointment, to her next of kin, exclusively of her husband; and, if she survived, then to her absolutely.—*Loch* v. *Bagley*, Law Rep. 4 Eq. 122.

See Devise; Forfeiture; Legacy; Mortmain; Trust, 1.

Witness.—*See* Will, 1.

Words.

"*Bound to or from.*"—*See* Ship, 1.

"*Heirs and Assigns.*"—*See* Legacy, 2.

"*Injuriously affected.*"—*See* Company, 1.

"*In to or out of.*"—*See* Ship, 1.

"*Issue.*"—*See* Devise, 1.

"*Strictly settled.*"—*See* Will, 5.

"*Water and Soil.*"—*See* Watercourse.

See General Words.

—*American Law Review.*

GENERAL CORRESPONDENCE.

Time for service of notice of trial.

To the Editors of the Canada Law Journal.

Gentlemen,—The present practice in regard to the time for service of notice of trial is to serve it eight days before the commission day. For instance, notice is given on the 8th day of a month for the 16th, the first day being excluded.

My contention is, that service in the above case on the 9th would be a sufficient compliance with the statute, (Common Law Procedure Act, Con. Stat. U. C. sec. 201,) which says, "Eight days notice of trial or of assessment (the first and last days being inclusive) shall be given," &c.

In the Common Law Procedure Act of 1856 the following words were made use of, "Eight days notice of trial or assessment shall be given and shall be sufficient," &c. All the decisions on the point in the Practice Reports are under the old act, namely *Vrooman* v. *Shuert*, *Buffalo and Lake Huron Railway* v. *Brooksbanks*, *Callaghan* v. *Baines*, *Clark* v. *Waddell*, and others, and I find none since the consolidation of the statute in which the above change was made except the case of *Allen* v. *Boice*, 3rd vol. Prac. Rep. 200, where it seems to have been taken as a matter of course by counsel, that service on the 26th of October for November 2nd was too late, and the point was not argued.

Your view of the subject, citing any cases since the Consolidated Statutes, would, I am sure, be very acceptable to the profession generally. Yours truly,

Student-at-Law.

[See *Cuthbert* v. *Street*, 6 U. C. L. J. 20, where it was decided that in computing the eight days required for notice of trial the commission day of the assizes must be excluded. This decision, which we should fancy is pretty well known by this time, has never been overruled to our knowledge.—Eds. L. J.]

The Insolvent Law of 1864—*Assignees.*

To the Editors of the Canada Law Journal.

Sirs,—I have read with much interest the communication of your correspondent "Scarboro'," on pages 47 and 48 of Vol. IV. N. S., and although his statements with regard to assignees in insolvency may be startling, I know, within my own experience, of similar cases, and that he has not at all over-stated or over-colored his case, and that they are true. For instance, in this county a trader largely indebted as a produce dealer absconded from the Province about five years ago, and took with him some thousands of dollars wherewith to commence business in the United States; but finding the people there more acute than himself, he soon became penniless; in this forlorn condition he returned to his former home (a comfortable brick cottage, nice orchard and garden, outbuildings, &c., all of which he had, before leaving Canada, conveniently placed in the keeping of an accommodating brother-in-law); he then went through the form of making an assignment of his estate and effects (?) to one of the assignees in insolvency appointed by a neighbouring board of trade, and struck a bargain with him to put him through for a named sum! The assignee instead of acting under the 10th section of the act, by calling a meeting of the creditors for the public examination of the insolvent, or having him and other persons examined before the judge as he, acting in the interest of the creditors generally, might and ought to have done for the purpose of ascertaining what his assets really were and what had become of the money wherewith he absconded, &c., set to work and solicited, in the interest of the insolvent himself, a release from the requisite number of his creditors, some of whom were told (also in the interest of the insolvent) that it was true "the man had committed a wrong in leaving the country as he had done, and so forth, but there was no use in keeping the poor man under; he was back now and would probably do better for the future," &c. And so the thing was procured through the importunities of the insolvent, aided by the disinterested recommendation of the assignee; the weight of whose position was lent to the procuring of that which under ordinary circumstances could not have been obtained, and which the assignee by all his might and main ought in the interests of truth and honesty, if not in that of the creditors, to have opposed. The result was that the requisite creditors signed the discharge, the notice of its deposit with the clerk of the County Court of the application for its confirmation was given by the assignee, and when the insolvent appeared

his petition for confirmation came up for hearing, all the papers and notices, &c., were found to be the work of the assignee, who had been the paid retainer of the insolvent, instead of the representative of the creditors; no one appeared to oppose the confirmation of the discharge, or to have the insolvent examined under the 3rd sub-section of the 10th section, the assignee did not do so at all events, and if he had acted in a way which comported with his duty in the matter he would have been there to oppose the confirmation of the discharge. Some of the creditors thought it would be useless to attempt to oppose it with the assignee doing all he could to promote it, and so the discharge was confirmed by the judge, and now the insolvent is enjoying the same property that he occupied before he absconded from the Province. It is a singular feature in the character of most of the assignees appointed by the Board of Trade to which I have before alluded, that, up to a very recent date, they were themselves insolvent in circumstances, or, to speak more plainly, they were nearly all insolvent debtors—persons who have not succeeded with their own affairs set to manage the broken down or disordered affairs of other insolvent people; and the assignee whose acts I have hereinbefore particularly alluded to was himself one of the number.

I observe your correspondent, Scarboro', speaks of the assignee's certificate as a prerequisite to a proper discharge of an insolvent by the judge. I should be very thankful if he would mention, for the information of your readers in general, and myself in particular, under what section of the Insolvent Acts of 1864 or 1865 he finds or infers it to be an essential, as I apprehend the authorities he refers to are applicable to the English Bankrupt or Insolvency Acts only.

Had I not already made this communication too long I should give my views upon some of the defects of the insolvency acts alluded to by "Scarboro."

Yours respectfully,

Union, May 1, 1868. Union.

[We shall be glad to have the views of our correspondent on the matters he alludes to.—Eds. L. J.]

REVIEW.

The Solicitors' Journal and Weekly Reporter. Milliken: 59, Carey Street, Lincoln's Inn, W. C. London.

We are in regular receipt of these excellent publications. The former, as its name implies, is devoted to the interests of the legal profession, and the latter gives a series of valuable reports which, despite the attractions of the new sys tem of Law Reports, still seems perfectly capable of holding its ground in the estimation of the public. The liberal use we make of the columns of both publications is the best proof we can give of our opinion of their excellence.

Speaking of this, we are concerned to find that an article taken from the pages of the *Solicitor's Journal* was copied by us and inserted under the head of "Selections," without the usual and proper acknowledgment of its origin. We are the more grieved at this, as it has been the unfortunate cause of leading our generally courteous brother, in a recent number, to indulge in some remarks which we should wish to believe were as foreign to the generous, and thinketh-no-evil spirit of our cotemporary, as they were in themselves unmerited. Such mistakes and such omissions as were complained of have been made before and will doubtless be made to the end of time, both by us and by others (and even our mentor is not quite infallible in this matter), but it is quite out of place and unfair to us, and we would respectfully submit, unbecoming in them, to accuse us of want of "decency in this respect," and "short comings in courtesy," &c.; such remarks would be uncalled for if the offence were twice as great.

It scarcely seems possible that even the "most excruciatingly mean of capacities" could imagine for an instant, certainly none of our readers here would suppose that the article alluded to was anything but a *selected* article, though we confess there was nothing to shew the *particular source* from whence it was taken. We, who are "only colonists", may expect an occasional snubbing from across the water, and it is only because we value the good opinion of our "big brothers," that we feel hurt when they go too far with their strictures; we have occasionally had the pleasure of receiving their praises, and we suppose we must submit to take the "kicks with the halfpence."

In conclusion—we are as jealous of the courtesy due from one journal to another as our English cotemporary; we are sorry that this or any other omission should have occurred, and hope it may not occur again, but if it should, we trust our cotemporary will be as little inclined to impute improper motives to us as we should be to others, if similarly offended against.

DIARY FOR JUNE.

1. Mon..Paper Day Q. B. New Trial Day C. P. Last day not trial for C. C. Recorder's Court sits.
2. Tues..Paper Day C.P. New Trial Day Q.B.
3. Wed..New Trial Day C. P.
4. Thurs. Re-hearing Term commences.
5. Frid..New Trial Day Q.B.
6. Sat. ...Easter Term ends.
7. SUN..*Trinity Sunday.*
9. Tues..Quarter Sessions and C. C. sittings in each Co.
11. Thurs. *St Barnabas.*
14. SUN..1*st Sunday after Trinity.*
20. Sat. ..Accession of Queen Victoria, 1837.
21. SUN..2*nd Sunday after Trinity.* Longest Day.
24. Wed..*St. John Baptist.* Appeals from Chancery Cham.
28. SUN..3*rd Sunday after Trinity*
29. Mon..*St Peter.*
30. Tues..Half-yearly School Returns to be made.—Dep. Registrar in Chancery to make returns and pay over fees.

THE

Canada Law Journal.

JUNE, 1868.

STATUTE BOOK OF ONTARIO.

The Statutes of the first Session of the first Parliament of Ontario have at length been issued — we may perhaps add, distributed, though, it does not appear to be the intention of the Government to supply them to Magistrates and others in the same lavish way that the General Statutes used to be. The tenth Section of the Interpretation Act makes a general provision for the distribution of the printed Statutes, directing copies to be sent to members of the Legislative Assembly in such numbers as may be ordered by resolution of the house or by order in council, and to such of the public departments, administrative bodies and offices, throughout the Dominion, as may be specified by order in Council.

Under the provisions of this Section the Statutes have been, and are to be disposed of as follows:—

One copy is to be sent free to each member of the Senate, and of the Commons of Canada, and four copies to every member of the Legislative Assembly of Ontario. Every official in each County in Ontario and heads of governmental departments are also to have a copy. Magistrates have to buy their copies at the reduced price of fifty cents each, but it is only duly qualified magistrates that are allowed this privilege; and to carry out this arrangement the Clerks of the Peace are to be supplied with copies for this purpose. The trade have to pay one dollar each for the statutes, which they again retail at any advance of twenty-five cents.

We understand the actual cost of the statutes, including binding, has been very small, and that the government will not be losers even at the reduced rate at which magistrates are supplied. This being so, we would respectfully ask why lawyers should not enjoy the same privilege as magistrates. Their profits are not now-a-days so immense that they can fairly be further taxed to provide a source of revenue to the country. Nor, do we think, there should, on principle, be any unnecessary restriction upon the widest diffusion of knowledge as to laws which all are supposed to know by heart as soon as they receive the Royal assent. The profession must buy the statutes at any price, and it may be said that it is from their contents that we partly derive the knowledge which is, to use a mercantile expression, our stock in trade, but by all rules of trade the benefit and profit are at least mutual as between us and the public, and whatever we pay extra is so much indirectly and unfairly added to their profits on the "transaction." If magistrates did their duties without fee or reward, they should certainly be at no expense for the statutes (and whether or not, they should in any case be provided free of charge, we are not now enquiring), but as they do not, in what respect, so far as the government is concerned, do we, in this particular differ from them. Our remarks, we beg leave to say, are quite disinterested, as we have to acknowledge the receipt of a copy of the book in question, courteously sent us by the Attorney General.

The acts which are of special interest have already been referred to by us, and many of them copied at length in a former number.

As to the general appearance of the volume now before us, notwithstanding the warning given in the 18th sec. of the act already referred to, we confess to having been rather startled at the gorgeous display of red and gold which it presents. We might be almost induced to say that the edition had been "got up regardless of expense," were it not that the proverbial economy of our present local administration precludes the possibility of such a thing. A closer examination would lead one to think that the new binding is very good in its way, the material being similar to that used in the less imposing statute books of the Dominion

and the Province of Quebec, (which latter is by the way the same in appearance as the old volumes, with the exception of the colour of the label on the back.) We fear, however that the red colour will be apt to become shabby sooner than the old kind. We should recommend a change in the lettering on the back of the next volume, as that on the present one is too much like that used for cheap editions of city directories and the like.

We regret that the very common difficulty of obtaining a good index has not been overcome in this case. There was a warning given by the most defective index to the Consolidated Statutes. But the compiler of the one before us appears to have forgotten one of the most obvious requisites of an index. This mistake will doubtless be avoided in future.

NEW CHANCERY ORDERS.

It is very generally known to the profession, that the Judge's Secretary, Mr. Taylor, has been for some time past engaged, under the supervision of the Chancellor and Vice-Chancellors, in consolidating the orders of the Court of Chancery.

It is supposed, when this most useful work shall have been accomplished and the accumulated mass of disconnected orders, which even the most industrious can scarcely keep track of, put into an accessible shape, that we shall at length have a respite from the shower of rules and orders that have fallen upon us for years past, as well as a breathing time wherein may be settled a little more definitely the practice of the Court of Chancery, which, by the way, uncertain and harassing as it is certainly sometimes found, is essentially progressive and expansive, and must, from the very nature of things, vary with the wants and circumstances of the country, and cannot in every respect be compared with the course of practice in the Common law Courts, which is necessarily more conservative in its nature and not affected by such a variety of outside and individual circumstances.

The very efficient Secretary of the Judges is also engaged, with indefatigable industry, in the preparation of a new and enlarged edition of his former work, with especial reference to the new orders. It will, we are told, contain all the new, or newly arranged orders and the acts affecting the Court of Chancery, with full notes on doubtful points and a variety of forms.

Judging from the past, and from the unrivalled opportunities which Mr. Taylor has of becoming familiar, not only with the orders themselves, but with the rules of practice, (imperfect, unsatisfactory and unknown as they are, which are supposed to guide, but often mislead practitioners), we may rely upon obtaining from the labour and learning of the Secretary a most useful auxiliary to the reading of the new orders, and valuable information as to Chancery practice in general.

In connection with this subject we may mention that Mr. Leggo, the Deputy Master at Hamilton, also proposes to publish a book on the practice of the Court of Chancery, with especial regard to proceedings in the Master's office. Such a publication, if carefully prepared, would be found most useful, and particularly so to country practitioners.

LAW EXAMINATIONS.

Law students and articled clerks are referred to the advertisement of the Law Society which appears in another place, in reference to examinations for call to the bar, or for certificates of fitness.

Very important changes have been made. The books for the first and second examinations for articled clerks under Mr. Blake's act, (the principle of which as to the increased number of examinations, has been adopted by the Benchers for students) are most of them new, but, so far as we can judge, carefully chosen and most desirable, as leading the reader by degrees, from the elementary to the higher branches of the profession.

The Law School and Lectures in Term are hereafter to be discontinued. We are sorry that it should have been thought advisable to give up the former, but probably it was found that the advantages to be derived from it were not commensurate with the expenses, particularly under what promises to be a more effective system for the majority—(though less satisfactory to the hard working minority) that is, frequent compulsory examinations. The benefits of the lectures in Term have proved to be at least questionable, and productive of little but disorder and "skylarking."

It will be noticed as features of this system, that the second examination includes a re-examination on the subjects and books of the first examination; also that there are only

two fresh books in the third examination of articled clerks, from which we argue that there will be a corresponding strictness and thoroughness in the examination as to the statute law and pleading and practice of the Courts. Of the desirability of this, there can be no question.

CONFLICTING DECISIONS IN LOWER CANADA.

We may be excused for expressing a little surprise at a decision in *Ex parte Smith* which we see reported in a recent number of the *L. C. Jurist*, where Judge Short held that a voluntary assignment made by an insolvent under 29 Vic. cap. 17, sec. 2, to an official assignee is valid, although the assignee is not resident within the district within which the insolvent had his place of business.

It is not that we object to a judge, by whose decisions we in Ontario can be affected only so far as we feel interested in the beneficial administration of the law in every part of the Dominion, deciding a question under a recent act of Parliament according to his own view of its proper construction, even though such interpretation may be contrary to the decision of judges here, whose opinions we may safely accept as the true rule in such a case,—but it is that it appears to us to be subversive of that uniformity so essential to the due administration of justice, and a source of harm and inconvenience to the public and annoyance to the profession, that a judge not sitting in appeal, and not so far as we are aware coming within those cases when he would be entitled to express his own views in opposition to decide cases, should give a judgment directly at variance with a decision upon exactly the same point, given by a court sitting in appeal (at least we are led by the report of the case so to understand it, but if wrong in this beg to be corrected), by which, at least according to our rules, he should be bound.

The learned judge did not even refer to the two cases cited by counsel in direct opposition to the decision he arrived at. One of these (*Douglas* v. *Wright*, 11 L. C. Jurist, 810) was a judgment of the Superior Court (*In Review*) in which three judges sat, one of whom certainly dissented from the majority, if that would make any difference. The other case (*Whyte* v. *Short*, *per* Loranger, J., Circuit Court of Richelieu) was also in point, and entitled to some weight, agreeing as it did with the case in Review.

The cases on the point in our own Courts (*Hingston* v. *Campbell*, 2 U. C. L. J., N. S., 299,— copied by the way into one of the Lower Canada legal publications, — and *White* v. *Cuthbertson*, 17 U. C. C. P. 377) may also in a question of this kind be said to be in point, and entitled to the consideration of judges in the sister Province.

It is in cases of this kind, where a statute applies to the whole Dominion or to any two or more of the Provinces, that a general court of appeal would operate so beneficially, by deciding authoritatively the law upon doubtful questions of construction, even though the question may be in itself of little moment, except that it should be definitely settled in *some* way.

DEATH OF MR. HEYDEN.

It is with much regret that we announce the death of Lawrence Heyden Esq., Clerk of the Crown and Plea, Queen's Bench, at his residence on Bloor Street, Toronto, on Saturday last the 20th inst., in the sixty-fifth year of his age.

His health had been failing for some months past, but none expected that his death was so near at hand.

The loss of such an estimable man and efficient officer will be felt by numbers both inside and outside the profession, and it will be long before those who had the pleasure of knowing him will forget his courteous and kindly manner, his uprightness and integrity in the discharge of his duties, and the attentive way in which his duties were performed.

R. G. Dalton, Esq., Barrister, has been appointed to fill the vacancy. We are happy to be able to congratulate the Ontario government on the happy selection they have made, and their promptitude in making it.

SELECTIONS.

PRESUMPTION OF LIFE AND DEATH.

(*Re Benham*, V. C. M., 15 W. R. 741, L. J. R., 16 W. R. 180.)

We are not surprised at finding that the decision in this case has been reversed on appeal, as it apeared to us to involve a misconception of the mode in which certain rules of presumption should be applied.

The rules in question are, first, that a person once living will, in the absence of evidence to the contrary, be presumed to continue alive,

at least until such a period as may be looked upon as a superior limit of the duration of human life; and the second, extended apparently by analogy from the Bigamy Act, 1 Jac. 1, c. 11, and the 19 Car. 2, c. 6, enabling reversioners or lessors to re-enter without proof of the death of the *cestuis que vient* on the lands held by tenants for lives—that after an absence of seven years without communication through any likely sources, the absentee will be presumed to be dead, so as to justify distribution of property in which he is interested on that assumption.

The question in *Re Benham's Trusts* was as to the practical result of these two rules. A great number of cases having established the principle that this presumption of death at the end of seven years is totally irrespective of the *date* of death, and that the *onus* of proving death at any particular date lies on those who allege it; the Vice-Chancellor stretched this a little further, and on the failure of this proof dealt with the fund on the opposite hypothesis. It does not, however, follow in these cases that because the *onus* of proof is on one claimant the Court will, on his failing to adduce proof, award the fund to the other.

A more correct view is to regard the Court as requiring a particular claimant to adduce a certain proof before it will act in his favour, but not necessarily, in default, acting for the oppposing claimant.

In *Re Benham*, a legatee under the will of a testator who died in 1860, had disappeared in 1854, and his representatives were held entitled as against those of the testator.

Such a decision is evidently inconsistent with the rule laid down by the Court of Exchequer Chamber after an elaborate discussion in *Nepean* v. *Doe*, 2 M. & W. 913, that "presumption relates only to the fact of death, and the time, whenever material, must be a subject of distinct proof." The action in that case was in ejectment, and the cause of action arose on the death of a person who had disappeared twenty-five years before action brought, so that it was material with reference to the Statute of Limitations whether the death could be presumed to have occurred at the end of the seven years.

Judgment was given for the defendant on the ground that proof of death within twenty years had not been shown.

Assuming the authority of this case, it would be necessary to hold that under circumstances like those in *Re Benham* no claim could be made through the missing legatee. But then the question arises how could the next of kin claim on the hypothesis of a lapse, as for that purpose they must prove that the legatee predeceased the testator, and there seems to be no escape from the conclusion that the fund must remain *in medio*. This the Courts have been reluctant to decide, as the following cases show.

Dowley v. *Wingfield*, 14 Sim. 277. A. disappears (we use the words in the sense of being last heard of) twenty months before his father's death intestate. His only brother was treated as sole next of kin on his giving security to refund. *Ex parte Creed*, 1 Dr. 235. A legacy is bequeathed to A. by a testator who died less than seven years after A.'s disapppearance, on condition of A.'s surviving a person who predeceased the testator by a few weeks, and in default to A.'s issue. The latter were not allowed to receive the legacy. *Lambe* v. *Orton*, 8 W. R. 111. A., who disappeared four years before the death of an intestate, held to have survived him, and that the *onus* was on persons disputing the claim of A.'s representatives of showing that A. was not one of the next of kin. *Dunn* v. *Snowden*, 11 W. R. 160. Property was distributed on the supposition that a legatee who had disappeared three year's before the testator's death survived him and died afterwards. The same was done in *Thomas* v. *Thomas*, ibid. 298, the Vice-Chancellor objecting to the form in which the rule was expressed in the marginal note to the former case, namely, that a person not heard of for seven years must be taken to have lived to the end of the seven years, but substantially re-asserting it in the form that a person must be taken to have lived until the lapse of a reasonable time from his disappearance.

It must be admitted that we have here, if not a strong concurrence of authority, a series of decisions by an able judge, establishing a rule practically equivalent to that asserted by Vice-Chancellor Malins, for we do not see how they can be otherwise explained, but we cannot discover a sufficient foundation for such a rule, and we have good authority for saying that a person claiming under a will or intestacy must prove his title. Accordingly, in *Re Benham's Trusts*, Lord Justice Rolt discharged the Vice-Chancellor's order, observing that the case was one, not of presumption, but of proof, and as there was not proof for the Court to act upon, further inquiries must therefore be made. No doubt, in a case where a person has disappeared *more* than seven years before the death of the testator or intestate, the claimant may rely upon the presumption of such person's death at that date, but he will not be allowed to establish his title by insisting (as was in effect done in *Dunn* v. *Snowden*) on a presumption of life for three years and death in the remaining four. Even in the former case we think the time on which the presumption arises too small, at least, in the case of personal estate, which, if delivered to the wrong person, may be irrecoverably lost, and we should prefer a rule that the property claimed should be secured in court and the income only, until further years had elapsed, dealt with. On the other hand it is desirable that some provision should be made towards quieting the possession of those who are allowed to receive the property, and we believe that ours is the only one of the European States in which, in the event of the return of the absentee, after an interval however long, the posses-

sor of his property is obliged to account, not only for the *corpus*, but for the past income, except so far as he may be protected by the Statute of Limitations.—*Solicitor's Journal.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

Marten v. Brumell and Richardson.

Composition and discharge—Assignment of judgment to a surety.

On 2nd May, 1867, defendant B. made an assignment under the Insolvent Acts; on 27th May, 1867, a deed of composition and discharge was made and executed by B. and R. (who had been sued as B.'s surety) and other creditors, as well as by the plaintiff, who, however, reserved his rights against any surety for his debt. On 10th Feb., 1868, plaintiff obtained judgment. On 13th Feb. R. took an assignment of the judgment for plaintiff, paying part only of the amount of the judgment debt.

On an application by defendant B. to have his name struck out of the proceedings and the judgment stayed as against him, on the ground that the plaintiff was a party to the deed of composition and discharge,

Held, that B. was entitled to this relief as well against the plaintiff as against R., and that he had accounted for his delay by a reasonable supposition that plaintiff was proceeding on the judgment to recover the balance of the debt from defendant R.

Semble, that the assignee of a judgment cannot enforce it, if his assignor could not.

[Chambers, March 11th, 1868.]

A summons was obtained on behalf of defendant, Brumell, calling on the plaintiff to show cause why the judgment signed, and *fi. fa.* issued, and all proceedings subsequent to the judgment should not be set aside and satisfaction entered on the roll, or why the name of the defendant, Brumell, should not be struck out of the judgment and all subsequent proceedings—or why all proceedings on the said writ or against Brumell, should not be stayed, and the plaintiff prohibited from further proceeding upon the judgment as against Brumell, or why proceedings should not be stayed till the fifth day of next term, and why the plaintiff should not pay the costs of the application, upon the grounds that the plaintiff's claim herein was paid and satisfied before the signing of the said judgment, and that he had no right to sign his name, and that proceedings herein are contrary to the agreement between the plaintiff's atttorney and the attorney of the defendant, Brumell, and that Brumell had, between the time of the signing of interlocutory judgment against him and the signing of final judgment, been released and discharged by the plaintiff's deed from all claim in respect to the matters in question in the said action, and upon grounds disclosed in affidavits and papers filed.

A deed of composition made 27th of May, 1867, between the defendant Brumell of the first part, and the other persons executing these presents, creditors of Brumell (and being a majority in numbers and representing at least three fourths in value of the liabilities of Brumell, subject to be computed in the execution of a deed of composition and discharge under the Insolvent Acts of the Province of Canada) of the second part, was put in and filed.

It recited that Brumell on the 2nd of May, 1867 executed an assignment of the estate, to James Watson for the benefit of his creditors to be administered according to the Insolvent Acts; and that Brumell had proposed to pay his creditors 6s. 8d. in the £, upon their respective claims in full discharge, and that the creditors had agreed to accept the same.

Brumell then covenanted to pay the said sum upon the execution of the said deed by the majority in number and three fourths in value of his creditors, and the parties of the second part agreed to accept the same, as far as they could, on behalf of all the other creditors or claimants of Brumell or other persons entitled to rank on the estate, and release Brumell from all claim, liability, cause of action, judgment, or suit which any such person or persons, creditor or creditors, may, can or otherwise might have against Brumell or his estate. And the parties of the second part released Brumell in respect of their own claims, &c., &c., reserving nevertheless to each of his creditors any security which they may respectively hold for the remaining 13s. 4d. in the £, and not thereby releasing any surety therefor. And it was declared that the deed was a deed of composition and discharge under the Insolvent Acts, and was intended to operate thereunder, and was also intended to have full effect as to the parties executing the same independently of the said acts. It was executed by the plaintiff as follows: "Henry O. Marten reserving, and without prejudice to my rights and remedies against any surety for my debt," and it was also executed by the defendant and Richardson.

This action was commenced by a summons, specially endorsed, on the 11th of May, 1867, and judgment for want of an appearance by Brumell was signed against him on the 22nd of the same month.

Mr. Scott, the attorney of Brumell, made affidavit that, subsequent to the signing of the interlocutory judgment, the plaintiff agreed to accept and execute the said deed of composition, as he was informed, and afterwards, as he believed, executed the same in the early part of June, 1867. Mr. Scott then stated "I remarked to Mr. Cameron (who was acting for Marten) to the effect that I presumed it would not be necessary to take any steps to have the deed pleaded, and he replied to the effect, that it would not be necessary, as nothing would be done in the action against Brumell, and it was accordingly so understood between myself, acting on behalf of Brumell and said Hector Cameron." That being in February, 1868, informed by Brumell that he feared Richardson intended to enforce the judgment against Brumell, as Brumell had been informed that Richardson had procured an assignment thereof from the plaintiff, "I thereupon called upon Mr. Cameron for an explanation of the matter. He did not seem to be aware previous to my informing him that such judgment had been signed or an assignment executed, and appeared surprised to hear that the same had been done. I requested he would give me a memorandum stating the understanding, but he declined to do so until he had made enquiry from persons in connection with his office as to what had taken place, but promised to write me at once: that on the 27th of February, instant, I received the

annexed letter from Mr. Cameron, by which it appears, as my belief is, that his recollection is at fault with respect to what took place" Of this letter the only material part is the following:—'The only circumstance with you on the subject, which I recollect, took place before the time for appearance expired, when, I think, the composition had been proposed and assented to by some creditors, but not by all. You then spoke of the necessity for your appearing for Brumell, and said that if the composition arrangement was completed, you supposed your client would not be prejudiced by the judgment against him in the suit and that if it were not completed and he went into Insolvency it would not matter in which opinion I concurred.'"

Mr Scott then stated that final judgment was signed against the defendants on the 10th of February last for $430 04 damages and $125 89 costs; that all but about $13 50 were costs occasioned by Richardson's defence: that he believed the amount of $564 was paid by Richardson, before judgment was entered, to the plaintiff's attorney, and that Mr. Whitley (acting for Richardson) informed Mr. Scott that the judgment had been assigned by the plaintiff to Richardson. Mr. Scott then set out a letter he wrote on 26th February, informing Mr. Whitley, that Brumell had been discharged by the deed before mentioned, and requesting him to consent that Brumell's name should be struck out of the judgment—otherwise he would apply for relief; that this letter had not been answered, and that a *fi. fa* against Brumell's goods had been sued out.

James Watson, the attorney of the creditors, made affidavit, that when he paid Mr. Cameron the composition for the plaintiff he said "he would proceed against Richardson for the balance, but that nothing should be done by the plaintiff against said Brumell."

Brumell stated that before Richardson took an assignment of the judgment and immediately after the execution of the deed of composition he was aware the plaintiff had accepted the composition and had executed the deed and relieved Brumell from all claims in respect of the pleadings mentioned.

The defendant Richardson, though not called on by the summons, filed certain documents:—The assignment of the judgment to himself, dated the 13th of February, 1868; the original bond signed by Brumell to the plaintiff, upon which Richardson was surety, and an undertaking by the plaintiff's attorney to assign the judgment to him and to allow him to enter it up.

Mr. Whitley made affidavit "that except so far as Richardson has been informed by me, I believe he has no knowledge of any of the circumstances which have taken place with reference to this action since the commencement thereof, that until the last few days, I had no knowledge of any agreement between Mr. Scott and Mr. Cameron, but such as is alleged on the affidavits filed in support of this application.

Whitley, for Richardson, shewed cause; no one appearing for the plaintiff. He referred to 26 Vic., ch. 45; *Sharp* v. *D'Almaine*, 8 Dowl, 664; *Gresly* v. *Gibson*, 12 Jur. N. S., 819; *Brooke* v. *Jennings*, 12 Jur. N. S., 841; *Evans* v. *Gill*, 1 B. & P., 52; Ch. Arch. Prac., 11 ed. 907–978.

Dalton supported the summons, referring to *Lister* v. *Mundell*, 1 B. & P., 427; *Shaw* v. *Shaw*, 6 O. S. 458; *Schofield* v. *Bull*, 8 U.C. L.J., 204; *Turner* v. *Davies*, 2 Saunders, 187 n.

Adam Wilson, J.—I must first consider this case as if it were between the plaintiff and Brumell alone. And so considered I should decide, on the affidavits of Mr. Scott and Mr. Watson, that the plaintiff was not to prosecute the suit against Brumell, in consequence of his protection under the deed of composition and discharge, to which the plaintiff is an express, assenting and executing party, and by which, for the composition agreed upon, he has absolutely discharged Brumell. Any proceedings taken after the deed in question would be set aside, if the application were made within a reasonable time after knowledge of proceedings being carried on.

In this case, proceedings were still continued by the plaintiff to the knowledge of Brumell, for two trials were had after the making of the deed, and Brumell would certainly be excluded from all relief, if he were now applying for the first time.

But the continuation of these proceedings is explained by the fact, that there was another defendant to the suit, against whom the plaintiff desired to obtain judgment; and therefore when Brumell saw this suit still going on, he believed, as he had reason to believe, it was going on not against himself, excepting formally, but against Richardson his co-defendant, who was still liable to the defendant.

If the agreement set up by Brumell, that the suit was not to be prosecuted against him for the purpose of enforcing payment or satisfaction, but formally only, for the purpose of reaching Richardson be established, he is not too late now in claiming relief as against the plaintiff. And I think this agreement is proved by Mr. Scott and Mr. Watson, whose statements are not opposed by what Mr. Cameron states in his letter.

But it is said although Brumell may be entitled to be relieved as against the plaintiff, it is different when he applies against Richardson, because he was no party to the agreement with the plaintiff, and he had no notice of it.

The deed shows that Richardson was a party to it, and that he thereby released Brumell "from all liabilities in respect to any claim, cause of action, judgment or suit, which he might have against Brumell, on account of any matter or thing whatsoever, whether such claim is direct or indirect, exigible, or accruing, reserving nevertheless to each of the creditors any security they may respectively hold for the remaining 13s. 4d. in the £, of their claims, and not hereby releasing any surety therefor." And although he signed the deed before the plaintiff did, and may therefore not have seen the reservation by the plaintiff of his rights, "against any surety for any debt," he must be taken to have had notice of what he signed himself; and of what he knew the plaintiff also signed, namely, that Brumell, as just stated, was released by the payment of 6s 8d in the £, but "not hereby releasing any surety therefor."

Richardson therefore knew that the plaintiff released Brumell from the debt, for which Richard-

son was surety, on getting 6s. 8d in the £ And that he (Richardson) was expressly held bound to the plaintiff for the remaining 13s. 4d. in the £.

Then Richardson knew also that he himself released Brumell from all liability, reserving any *security* he had, and his rights also against any surety there was; but he has no security, and certainly none that was of any value to him, after Brumell himself was released—there was no mortgage, or lien, or collateral documents which he held. He had nothing whatever but the instrument, on which Brumell was liable, for this particular debt; and he could never hold that against him. At that time too, he did not hold this bond, for he did not pay it till a long time afterward. How had he any surety for this defendant, who was not to be released?

So far as the bond was concerned, the plaintiff was expressly discharging Brumell from it; and Richardson knew it, and concurred in it. But whether he concurred or not, would have made no difference, for whatever the proper majority in numbers and value of the creditors chose to do would have bound Richardson and the plaintiff too, even against their will.

I think here that Richardson must have known the plaintiff could not after this release, and have prosecuted the suit against Brumell's consent, for the purpose of obtaining satisfaction against him. And that he must have known further that the plaintiff was prosecuting the suit solely for the purpose of obtaining a recovery against himself as surety for the remaining 13s. 14d. in the £, under the express reservation, which was contained in the deed, of his rights against sureties. And that after such recovery was had against himself he could not enforce any remedy against Brumell, whom he also had expressly released.

Neither the plaintiff nor Richardson should therefore be allowed to enforce this judgment against Brumell, his delay in applying for protection being satisfactorily explained, certainly as against the plaintiff, and, in my opinion, as against Richardson too.

Even if it appeared that Richardson had no kind of knowledge of Brumell's position in the suit after the execution of the deed, and had no knowledge either of the bargain between him and the plaintiff as to the way in which it was to be carried on, I should doubt exceedingly his right to enforce a judgment by assignment which the plaintiff himself could not enforce, for he must take that only which the plaintiff has a right to transmit. Suppose the plaintiff had recovered or received payment in full from Brumell, unknown to Richardson, it could scarcely be argued that, on Richardson afterwards paying the plaintiff a second time, he could enforce payment over again from Brumell.

He must take the plaintiff's rights or nothing, and he must deal with the plaintiff, as well after as before the judgment, at his peril.

It is not necessary I should decide this point, nor the further point that was adverted to, namely, that Richardson could not take an assignment as he had not paid the whole judgment but two thirds of it, or 13s. 4d. in the £, only. It may be true a defendant who does not pay the whole judgment debt cannot compel the plaintiff under the Statute to assign the judgment to him, but if the plaintiff chose to do so, I do not see why a surety should not enforce against the principal any amount the surety has been compelled to pay and could justly recover from the surety in an action at law, by execution issued upon the judgment.

There is another reason why this judgment should not be used against Brumell for the full amount for which the execution has issued, even if it could be acted on at all, and it is that the whole costs were incurred but to a trifling amount in trying the special defence of Richardson applicable to his own position, and not in any way affecting the liability of Brumell, the principal—and these costs should not be recovered from Brumell under any circumstances, for he could not demand them in an action at law.

In every view of the case it appears to me Brumell should be relieved from this judgment and execution. I must therefore order the execution and all proceedings under it to be set aside, and satisfaction to be entered on the roll in such form that Brumell shall be discharged from it, with costs to be paid by Richardson to Brumell. And I further order that no action shall be brought in respect of the issuing of the execution, or of any proceedings that may have been taken under it against Richardson or against any other person.

See *Bartlett* v. *Stinton*, 12 Jur. N. S. 842; L. R., 1 C. B., 483.

Re Barton.

Summons to shew cause not referring to the papers filed upon which it was founded.

[Chambers, February 20, 1868].

A motion being made to make absolute a summons calling upon an attorney to deliver his bill of costs.

Curran objected, that as the summons did not refer to any affidavits or papers as having been filed, they could not be read in support of the summons, which must therefore be discharged.

W. S. Smith, contra, argued that the summons was sufficient, but if not, he asked that he might be allowed to amend it.

Adam Wilson, J.—I do not feel inclined to give any weight to this objection, and unless some authority to the contrary is produced I shall allow the summons to be amended at once.

Corrigan v. Doyle.

Interlocutory judgment on default of plea—Notice to plead—C. L. P. Act, sec. 56.

Sec. 56 of C. L. P. Act, taken in connection with secs. 91, 92, and Rule 132, is to be read thus, "the plaintiff may file *and serve* a declaration endorsed with notice to plead. &c."

Held therefore, that it was not a valid objection to an interlocutory judgment, that the copy of declaration filed was not endorsed with a notice to plead.

[Chambers, March 20, 1868.]

The defendant obtained a summons, calling on the plaintiff to show cause why the interlocutory judgment signed herein for want of a plea, and the issue book and notice of assessment, and all other proceedings had therein, should not be set aside on such terms as to the judge in Chambers might direct, for irregularity, on the following grounds:

1. That the writ of summons and affidavit of service were not filed before the declaration, and that the affidavit of service now attached to the writ, is not marked or filed by the clerk, nor is it stamped according to the statute.

2. That no notice to plead is endorsed on the declaration filed, or filed therewith.

3. That the declaration was not served as of the day on which it bears date, and the declaration served is not a copy of the declaratson filed.

4. That the issue book does not contain, or is not a copy of the declaration filed or served, and on the grounds disclosed in affidavits, and papers filed, and why in the meantime all proceedings should not be stayed.

W. Sidney Smith, shewed cause.

C. W. Paterson, contra.

Hagarty, J.—The summons is to set aside the interlocutory judgment, issue book and notice of assessment, &c., on alleged irregularities.

As to the writ of summons, affidavit and other earlier proceedings, I think it is too late to object to them, and the motion is not directed to set aside anything prior to the judgment.

The chief objection to the judgment is that there is no notice to plead endorsed on the declaration filed therewith. Section 56 of C. L. P. Act says, "plaintiff may file a declaration endorsed with a notice to plead in eight days, and in default of a plea, may sign judgment by default at the expiration of the time to plead so endorsed."

If this stood alone, it would almost seem that a defendant is bound to plead merely on the filing of notice. But Rule 132 directs that a copy of declaration shall be served on defendant. Section 91 of the Act says, "the time for pleading shall be eight days, and a notice requiring defendant to plead in eight days, otherwise judgment, may be endorsed on the copy of the declaration served, or be delivered separately." By section 92 a notice requiring the opposite party to plead, &c., within eight days, otherwise judgment, shall be sufficient without any rule or other demand, and such notice may be delivered separately, or be endorsed in any pleading which the other party is required to answer.

Reading those sections and the rule of court together, I am not prepared to hold that the mere omission to endorse a notice to plead on the declaration filed, must necessarily defeat the plaintiff's right to sign judgment after duly serving an copy of the declaration with such notice endorsed.

Perhaps the fair way to read clause 56, by the light of the subsequent clauses and rule, is, that "the plaintiff may file *and serve* a declaration endorsed with a notice to plead in eight days, and and in default of a plea may sign judgment by default at the expiration of the time to plead so endorsed." This would appear the most natural construction so as to give full weight to clause 92, "such notice may be delivered separately or be endorsed on any pleading which the other party is required to answer."

Under section 56, it might be endorsed on the pleading which defendant is required to answer. Under section 92, it may also be delivered separately.

It seems to me the objection fails.

Fountain v. McSween.

Appearance—Infant—Prochein amy.

An appearance entered by attorney for an infant defendant (no *prochein amy* having been appointed) is a nullity, not an irregularity. Interlocutory judgment cannot be signed till after *prochein amy* appointed.

[Chambers, March 21, 1868.]

This was an action brought by the plaintiff against an infant defendant, who entered an appearance by attorney and not by *prochein amy*. Declaration was filed and served with notice to plead. No plea being filed, judgment was entered for want of a plea on the 15th of March, 1868.

On the 18th of March, 1868 after declaration served and before judgment entered, a notice was served on the plaintiff's attorney stating that the defendant was an infant and that an application would be made to appoint a *prochien amy*. And on the same day a summons for further time to plead was obtained from the judge of the County Court, which was however discharged upon which judgment was signed and notice of assessment served and accepted for the Walkerton assizes.

On the 16th March 1868 a summons was taken out to set aside the appearance, declaration, the judgment entered in this suit and all subsequent proceedings, with costs, on grounds disclosed in in affidavits and papers filed.

It was contended on the part of the plaintiff that the appearance &c., were irregularities and that the grounds ought to have been disclosed in the summons; and that the taking out of the summons for further time to plead and the acceptance of notice of assessment acted as waivers of the notice. That the application was too late on account of the defendants laches, in this, that the application should have been made immediately after discovery that the appearance was irregular.

For the defendant it was argued that the appearance, &c., were nullities and, as such, that the grounds for setting them aside need not be set forth in the summons, and that there is no waiver of a nullity. That it was incumbent on the plaintiff, when the mistake was discovered, to apply to have it set aside.

Hagarty, J.—It seems to me that the appearance entered for the infant defendant by attorney is a nullity, and if judgment be entered by plaintiff, error in fact will lie. I also think, contrary to my first impression, that defendant can be heard to move to set aside the proceedings, and that he will not be left necessarily to his writ of error. In *Oliver* v. *Woodroffe* 4 M. & W. 650, a cognovit and appearance entered for defendant were set aside on his motion on grounds of infancy. The plaintiff here could have applied to set aside this appearance with costs as irregular, and, at least after notice of the infancy of plaintiff, still proceed. I think the proceedings may be moved against.

The latest case that I have seen is *Carr* v. *Cooper*, 1 B. & S., 230, where defendant, an infant, appeared by attorney, and plaintiff after verdict signed judgment, and defendant brought error in fact. The plaintiff applied to amend all the proceedings in error. The Court refused the relief asked, but set aside all the proceedings subsequent to appearance and ordered defendant

to appear by guardian in six days. *Re Jarman* v. *Luca*, 5 C. B. N. S. 474, may also be referred to.

Nunn v. *Curtis*, 4 Dowl. 729 is an express authority for interfering on motion, instead of leaving the defendant to his writ of error.

I think all the proceedings after withdrawal of appearance must be set aside, but under the circumstances without costs. See Lush's Practice, Vol. 1, 232.

ENGLISH REPORTS.

COMMON PLEAS.

ROBINSON v. NESBITT.

CROW AND ANOTHER, *Approvers*; REEVES AND ANOTHER, *Garnishees*.

Mayor's Court—Attachment—Garnishee—Notice of equitable assignment.

An equitable assignment of property which is subsequently attached, bars the garnishment, though notice of the assignment has not been given to the garnishee before the attachment.

Watts v. *Potter*, 3 E. & B. 743, dissented from.

[16 W. R. 543, Jan. 31, 1868.]

It appeared that Robinson, the plaintiff, had brought three actions in the Mayor's Court against Nesbitt, the defendant, and attached certain railway shares which the latter had deposited by way of security for a loan, with Reeves and Whitburn the garnishees. There were three attachments made respectively on the 6th, the 7th, and the 10th of August, 1867, being the days on which the actions were entered. It seems that £2,700 Consols had been purchased in the name of the defendant, as trustee under the marriage settlement of Frederick Alfred Crow, one of the approvers, and that the defendant, in breach of trust, had sold out this sum and employed the proceeds, or a large part of them, in paying calls on ninety-seven Riga and Dunaberg Railway shares, of which he was possessed, and which previously to June, 1867, he had deposited with the garnishees as security for a loan of £700 advanced by them to him and one Gurney. Mr. Malleson, the approver's solicitor, having learnt that the defendant had dealt with the Consols as above stated, insisted upon the shares being transferred to him, and on the 7th June, 1867, before the date of the attachments, or any of them, obtained the following order from the defendant:—

"Please to deliver my ninety-seven Riga and Dunaberg Railway shares to Mr. Malleson Dated 7th June, 1867. "P. R. NESBITT.

"Messrs. Reeves & Whitburn."

The garnishees had no notice of this order till the 16th August, which was after the last of the attachments. They then, on repayment of the sum advanced, gave up sixty-seven of the shares to Malleson, retaining the others to answer the plaintiffs attachment. In respect of these latter shares the approvers, on the 22nd August, entered a bill of proof, and, the plaintiff having appeared thereto, delivered their probation as follows:—

The said approvers, by John Nesbitt Malleson, their attorney, say that before the said goods and chattels, being thirty shares in the Riga and Dunaberg Railway Company, numbered 16,671 to 16,700, being in the hands and custody of William Reeves and Charles Whitburn, were, or any part thereof was, attached and defended, &c., as aforesaid, to wit, on the 15th day of June, 1867, the defendant, Pearce Rogers Nesbitt, agreed with the said approvers that the said shares, which were, and are, shares transferable by delivery, should or might be received and held by them (after satisfaction of a certain lien thereon of the said William Reeves and Charles Whitburn, which lien has since been fully satisfied and discharged by the said approvers, to wit, on the 16th of August, 1867) as security for the replacing or making good by the said Pearce Rogers Nesbitt of certain Three per Cent Consolidated Bank Annuities, to wit, £1,357 19s 8d. Three per Cent. Consolidated Bank Annuities which have not, nor has any part thereof, hitherto been replaced or made good, and whereof the said Pearce Rogers Nesbitt has been possessed upon certain trusts, and which then ought to have stood in his name in the books of the Governor and Company of the Bank of England in trust for the said approver, Frederick Alfred Crow, for his life, and after his decease upon trust for the benefit of the said approver, Emma Maria Crow, her executors, administrators and assigns, and which said trust fund had been before then sold and disposed of by the said Pearce Rogers Nesbitt, in breach of the said trust, and the proceeds of such sale applied in the payment of calls on the said shares. And the said defendant then transferred the property of the said shares, subject to the said lien, to the said approvers, *whereof the said William Reeves and Charles Whitburn had notice before any of the times when the said goods, chattels and shares were or any part thereof was, attached as aforesaid.* And the said goods, chattels, and shares so attached as aforesaid were not, nor was any part thereof, the goods, chattels, or shares of the said defendant when attached as aforesaid, and then were the goods, chattels and shares of the said approvers. And the said approvers claim to be admitted to prove the premises accocording to the custom of the City of London.

Replication.—And the said plaintiff in person as to the probation of the said approvers, says that the defendant Pearce Rogers Nesbitt did not agree with the said approvers in manner and form as alleged by the said approvers in their said probation, but, on the contrary thereof, the said goods, chattels and shares so attached as aforesaid, were and are the proper goods, chattels and shares of the said defendant, and are not the property of the said approvers; and this the plaintiff prays may be inquired of by the country, &c.

Joinder of issue.

The question was tried in the Mayor's Court on the 29th of November, when the learned Recorder was of opinion that as no notice of the equitable assignment of the shares to the approvers had been given to the garnishees before the attachments, there was no vesting of the property in the approvers so as to bar the garnishment, and the plaintiff had a verdict.

Atkinson having obtained a rule, pursuant to leave reserved, to set aside the verdict and enter it for the approvers.

Butler Rigby now showed cause. He cited *Watts* v. *Porter*, 3 E. & B. 743, 23 L. J. Q. B. 345; Brandon on Attachment, p. 50.

Atkinson, contra, was not called upon.

Bovill, C.J.—The effect of the decision of the Lord Chancellor and the Lords Justices in *Beavan* v. *The Earl of Oxford*, 4 W. R. 113, 24 L. J. Ch. 311, is, that notice of an equitable assignment is not necessary. The defendant here is only a trustee for the assignee.

Willes, J.—No notice was necessary. The decision of the Recorder no doubt proceeded on *Watts* v. *Porter*, but we agree with the Lord Chancellor and the Lords Justices. See also *Kinderley* v. *Jarvis*, 4 W. R. 579, 22 Beav. 1.

Keating and Smith, JJ., concurred.

Rule absolute.

[See *Pickering* v. *The Ilfracombe Railway Company*, 16 W. R. 458.]

CHANCERY.

Stein v. Ritherdon.

Will—Construction—"Estate and effects"—Real estate.

The word "estate," in a will, is to be construed as passing both real and personal estate, even though the accompanying expressions are more applicable to personal estate only, unless the context absolutely negatives such construction.

Pogson v. *Thomas*, 6 Bing. N. C. 337, remarked on.

[V. C. M., Feb. 19, 1868,—16 W. R. 477.]

One of the points which arose in this case was, whether the words "estate and effects" in a will were sufficient to pass a freehold house belonging to the testator, Talbot Ritherdon. The material clause of the will, which was dated June 5, 1866, was the following:—

"I give and bequeath all my household furniture plate linen musical instruments books wine ready money goods and chattels unto my daughter Adelaide Ritherdon for her own use and disposal absolutely and as to all the *rest and residues of my estate and effects* I give and bequeath the same unto Charles Stein and William Sutton and the survivivor of them their or his executors administrators or assigns (and who are hereinafter respectively designated as 'my trustees') upon trust with all convenient speed after my decease to collect get in and receive all debts or other moneys due and owing or otherwise payable to me at the time of my decease and to sell and convert into money any government stocks or shares in public or other companies of which I may die possessed and call in any moneys which at the time of my decease may be out on mortgage at interest or continue the said stocks and shares and mortgage moneys in these their present investments as to my trustees shall in their or his discretion seem most advantageous for the benefit of the said trust estates and upon trust as to all the capital moneys estate and premises which shall respectively come to the hands of my trustees or by virtue of my will to lay out and invest the same in the parliamentary stocks or public funds of Great Britain or at interest on real leaseholds or other security or securities (not being personal nor in Ireland) in their or his names or name with full power from time to time to alter vary transpose and change the same as in their or his discretion shall seem fit. And I declare that my trustees shall stand and be possessed of the interest dividends and annual produce thereof and of such interest and dividends as may be due to me at the time of my decease upon trust, &c."

There was no clause in the will to pass a freehold house in Dover, of which the testator was possessed, unless it was held to pass under the above words.

The heiress at law of the testator contended that the freehold house descended to her, and did not pass by the will.

The trustees of the will filed a bill, praying among other things for a declaration whether the real estate of the testator was devised by the will to the trustees, or was undisposed of and descended to the heiress at law.

Pearson, Q. C., and *Buchanan*, for the plaintiff, cited *Saumarez* v. *Saumarez*, 4 M. and Cr. 331; *O'Toole* v. *Browne*, 3 Ell. & Bl. 572, 2 W. R. 430, to show that the words "estate and effects" include all that a testator has to dispose of: *Stokes* v. *Solomons*, 9 Hare, 75.

Glasse Q. C., and *Begge*, for the defendant, heiress-at-law, cited *Pogson* v. *Thomas*, 3 Bing. N. C. 337; *Meads* v. *Wood*, 19 Beav. 215; *Doe d. Spearing* v. *Buckner*, 6 T. R. 610; *Coard* v. *Holderness*, 20 Beav. 147, 3 W. R. 311; *Molyneux* v. *Roe*, 8 D. M. G. 368, 4 W. R. 539, and argued that the general words "estate and effects" might well be qualified, as in this will, by reason of the trusts declared being applicable only to personal estate.

His Honour said there was no doubt the testator had not present to his mind when he made his will that in fact he was owner of any real property in fee simple. Still, as it is important that wills should be construed on broad general principles, the effect of general words such as *estate and effects* ought not to be cut down by the circumstance that accompanying expressions are applicable to personal estate only. No word could be more proper to pass all that a testator possesses than the word "estate," and though no doubt words of limitation ought to be carefully attended to, where the construction was in other respects doubtful, there was no such even balance of authority here as to require such minute criticism. All the authorities were in favour of including the real estate, except *Pogson* v. *Thomas* in the Common Pleas, and that case was only reported as a reference from the Master of the Rolls to the judges. And no grounds were given for the decision in the certificate. That case would not be probably followed at this time, and he should declare that the freehold house of the testator passed under the residuary bequest.

The Digest of the Law.—We understand that the Law Digest Commissioners have selected the three following gentlemen as the successful competitors in the preparation of Specimen Digests:—Mr. Henry Dunning Maccleod for a specimen digest of the law of Bills of Exchange; Mr. William Richard Fisher for a specimen digest of the law of Mortgage, including Lien; and Mr. John Leybourn Goddard for a specimen digest of the law of 'Incorporeal Rights, including Rights of Way, Water, Light, and other Easements and Servitudes.' We believe that there were more than eighty competitors.—*Law Journal.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR NOV. AND DEC., 1867, AND JAN., 1868.

(*Continued from page* 130.)

ADEMPTION.

1. By will, made in 1824, A. gave all his estate to trustees on trust after payment of his debts, to divide the residue equally between such of his children as should be living at his death, and the issue of such as should then be dead. On the marriage of his son B., in 1849, A. agreed to pay the trustees of the marriage settlement £350 a year during the life of B. and of B.'s wife, should she survive B. On the death of A., in 1865, *held*, that the gift by will to B. was adeemed *pro tanto* by the provision of £350 a year, made for him by the agreement of 1849.—*Dawson* v. *Dawson*, Law Rep. 4 Eq. 504.

2. A., by will, dated April, 1864, gave £500 to his daughter, should she marry, the same to be paid on the marriage-day, or as soon after as convenient. The daughter married in September, 1864, and, in the following November, A. gave the husband £400 towards furnishing. He afterwards promised £600 more, but died before fulfilling the promise. *Held*, that the presumption that the legacy of £500 had been *pro tanto* adeemed by the gift of £400 was not rebutted by the unfulfilled promise.—*Nevin* v. *Drysdale*, Law Rep. 4 Eq. 517.

ADMINISTRATION.

1. A testator gave legacies, some of which were absolute, and others contingent on the legatees arriving at twenty-one, and he gave the residue of his estate to A. for life, remainder to B. *Held*, that, though the executors could pay debts and legacies out of any funds they pleased, yet, as between A. and B., A. was entitled from the death of the testator to the income of his estate, after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay debts and absolute legacies. *Held*, also, that A. was entitled to the income of such part of the residue as was in a proper state of investment *in specie*, and, as to the rest, of so much consols as would have been produced by conversion on the testator's death. *Held*, also, that A. was entitled to the income of the fund set apart to meet the contingent legacies till the happening of the contingency.—*Allhusen* v. *Whittell*, Law Rep. 4 Eq. 295.

2. A debt due from A. was compromised by the payment of a large sum, several years after A.'s death. *Held*, that the amount due for principal and interest at A.'s death must be treated as a debt due from his estate, and the *corpus* reduced by that amount; and that any benefit to the estate from the compromise must, as between those entitled to the *corpus* and income, be apportioned in the ratio of the amount due from the testator, at his death, to the further amount due from his estate at the time of the compromise.—*Maclaren* v. *Stainton*, Law Rep. 4 Eq. 448.

3. A testator directed his executors to convert his personal estate when and as they should see fit, and gave them power to sell his ships till they could satisfactorily be sold. He gave his estate to A. for life, with remainders over, and gave his executors power to invest at their discretion, or allow to remain as then invested, all his funds in certain specified securities. His ships gained considerable earnings after his death; and he had, at his death, large sums invested in the specified securities, and large sums invested in securities of other descriptions, not proper for the investment of trust funds. *Held* (1), that A. was not entitled to the earnings of the ships as income, but was entitled to interest at 4 per cent. an the value of the ships from the testator's death; (2) that A. was entitled to the actual income of the investments in the specified securities; (3) that, as to the unauthorized investments, A. was entitled only to an income, from the testator's death, equal to the dividends of the consols which would have been produced by a sale and investment in consols at a year from the testator's death, and not to an income equal to interest at 4 per cent. on their value.—*Brown* v. *Gellatly*, Law Rep. 2 Ch. 751.

4. Part of the assets of a testator consisted of a debt due from A., one of his residuary legatees. B., another residuary legatee, died, intestate, leaving A. one of his next of kin. A. having become bankrupt, the executor of the testator proved the debt in bankruptcy, and received a dividend. *Held*, (1) that the executor of the testator had not lost the right to retain the debt, less the dividend, out of A.'s share as residuary legatee; (2) that the administratrix of B., who was also administratrix *de bonis non* of the testator, could not retain the debt out of A.'s share of B.'s estate.—*Stammers* v. *Elliott*, Law Rep. 4 Eq. 675.

See Advances; Limitations, Statute of; Trust, 3.

ADMIRALTY.

In a cause of wages, the Admiralty has jurisdiction of a claim by a seaman for compensa-

tion for wrongful discharge before the end of his term of engagement.—*The Great Eastern*, Law Rep. 1 Adm. & Ecc. 384.

Adultery.—*See* Divorce, 1.

Advances.

Under the provision of the Statute of Distributions, which excludes from sharing in the personal estate of an intestate any child who may have been advanced by portion equal to his share, *held*, (1) that a premium of £540, paid on a son's being articled to an attorney, was an advance, though the profession was afterwards relinquished; (2) that the price of a commission in the army for the son was an advance,—whether £288, paid for outfit and horses for the son on entering the army, was an advance, *quære;* (3) that sums from £50 to £550, amounting in all to £2,000, paid in discharge of the son's gambling debts, nonpayment of which would have compelled him to leave the army, were advances.—*Boyd* v. *Boyd*, Law Rep. 4 Eq. 305.

Agent.—*See* Factor.

Agreement.—*See* Contract.

Aider by Verdict.—*See* Pleading, 2.

Alimony.—*See* Divorce, 2.

Ancient Light.—*See* Light.

Annuity.

A testator directed his trustees to invest his property, and "with and out of the annual proceeds thereof levy and raise the annual sum of £100," and pay it to S. for life. "and from and after the payment of the said annual sum of £100, and subject thereto," to stand possessed of the said trust funds on certain trusts. The income was insufficient to pay the annuity. *Held*, that the deficiency must be made up out of the *corpus*.—*Birch* v. *Sherratt*, Law Rep. 2 Ch. 644.

Appeal.

1. The Queen in Council has jurisdiction of an appeal from the colonies in criminal as well as civil cases; but, in a criminal case, an appeal will be granted only under special circumstances.—*The Queen* v. *Bertrand*, Law Rep. 1 P. C. 520.

2. Leave to appeal from a conviction of a colonial court for a misdemeanor having been granted, subject to the question of the jurisdiction of the Privy Council to entertain the appeal, and it appearing that since such leave the appellant had received a free pardon, the Judicial Committee of the Privy Council declined to enter upon the case, and dismissed the appeal.—*Levien* v. *The Queen*, Law Rep. 1 P. C. 536.

Assignment.

1. When a chose in action has been assigned, equity would restrain a debtor from setting off against the assignee a debt which has become due from the assignor since notice of the assignment, though resulting from a contract made previously, unless from the nature of the transaction it appears that the original parties intended that the one should be set off against the other.—*Watson* v. *Mid. Wales Railway Co.*, Law Rep. 2 C. P. 593.

2. A., the tenant for life of a trust estate, mortgaged it, and it was sold by the mortgagee. Afterwards, the purchaser and mortgagee, for a nominal consideration, assigned to A. certain alleged arrears of profits of the trust estate, which, as alleged, the trustees had made in excess of the profits for which they had accounted. *Held*, that A. could not maintain a bill, on this assignment, against the trustees for an account of the profits.—*Hill* v. *Boyle*, Law Rep. 4 Eq. 260.

3. A conveyance by a debtor of his goods to two creditors, for the benefit of themselves and the other creditors, passes the property at once, without any assent by the trustees; but the knowledge of the debtor, at the time of the conveyance, that an execution is out against his goods, is the constructive knowledge of the trustees, within the proviso of 19 & 20 Vict. c. 95, § 1, and therefore the goods are bound by the delivery of the writ to the sheriff.—*Hobson* v. *Thelluson*, Law Rep. 2 Q. B. 642.

Attorney.—*See* Bankruptcy, 2; Champerty.

Bankruptcy.

1. To subject a bankrupt to the penalties of the Bankruptcy Act, as having contracted debts without reasonable expectation of being able to pay them, it is not enough that he contracted in the aggregate a greater amount of debts than he could reasonably expect to pay, but there must be particular subsisting debts, which, at the time when they were contracted, he could not reasonably have expected to be able to pay.—*Ex parte Brundrit*, Law Rep. 3 Ch. 16.

2. A. owed a debt to B., but had a claim against B. for costs. A. became bankrupt. *Held*, that A.'s claim for costs could not, in bankruptcy, be set off against the debt due to B., because A.'s solicitor had a lien on the costs, and that therefore execution might issue against B. for the costs.—*Ex parte Cleland*, Law Rep. 2 Ch. 808.

3. Under 24 & 25 Vict. c. 134, § 73, if the goods of a trader are levied on and sold under an execution for more than £50, he is to be deemed to have committed an act of bankrupt-

cy; and if, within fourteen days from the sale, he is adjudged a bankrupt, the money is to be paid to the assignee in bankruptcy. An execution was levied on the goods of a trader; and he, being insolvent, in consideration of the withdrawal of the execution, assigned to A., the judgment creditor, the whole of his property, and ceased to carry on the trade. The jury found the transaction *bona fide*. *Held*, that, as the creditors generally could have interfered and taken the proceeds of the execution, there was no sufficient consideration for the assignment to A., which was therefore void, and an act of bankruptcy. — *Woodhouse* v. *Murray*, Law Rep. 2 Q. B. 634.

See Administration, 4.

Bill of Lading.

A. was indorsee of a bill of lading, drawn in a set of three, of cotton, which had been lately landed, under an entry by A., at a sufferance wharf, with a stop thereon for freight; on March 4, A. obtained from M. an advance on the deposit of two copies of the bill, M. assuming the third to be in the master's hands; on March 6, the stop for freight being then removed, A. obtained from B. an advance on the deposit of the third copy of the bill, which A. had fraudulently retained. On March 11, B. having been then informed of M.'s prior advance, sent his copy of the bill to the wharf, and had the cotton transferred in his own name, and afterwards sold it and received the proceeds. *Held*, that the bill of lading, when deposited with M., retained its full force, though the cotton had been landed and warehoused; that there was a valid pledge of the cotton to M., and he could sue B., either for conversion of the cotton or for the proceeds of the sale. [By 11 & 12 Vict. c. 17, § 4, goods landed at a sufferance wharf remain subject to the same lien for freight that they were liable to on board the ship.] (Exch. Ch.)—*Meyerstein* v. *Barber*, Law Rep. 2 C. P. 661.

See Negligence; Stoppage in Transitu.

Bills and Notes.

A., through an agent, obtained from a banker in London circular notes, payable by certain correspondents of the banker in various foreign towns mentioned in an accompanying "letter of indication." The agent sent the letter and notes, by mail, to A. in Paris: the letter arrived safe, the notes did not. *Held*, that A., apart from any equitable relief on giving indemnity, could not recover the money paid to the bankers, on tendering the letter of indication only.—*Conflans Stone Quarry Co.* v. *Parker*, Law Rep. 3 C. P. 1.

See Factor.

Bond.—*See* Legacy, 3.

Capital.—*See* Administration, 1, 2; Annuity; Legacy, 1.

Carrier.—*See* Negligence; Railway, 1, 2.

Champerty.

The plaintiff agreed to share with a solicitor the profits arising from the successful prosecution of a suit to establish his title to property, on being indemnified against the costs. *Held*, that though the contract amounted to champerty and maintenance, yet the plaintiff was not disqualified from suing, since his title was vested in him, before the making of the illegal contract. A decree was made in his favor, but without costs.—*Hilton* v. *Woods*, Law Rep. 4 Eq. 432.

Charity.

1. A legacy to a charitable institution, which was dissolved in the testator's lifetime, lapses. —*Fisk* v. *Attorney-General*, Law Rep. 4 Eq. 521.

2. Testatrix gave £1,000 consols to A. and his successors, on trust, to apply so much of the dividends as should from time to time be necessary to keep in repair her family grave, and to divide the residue at Christmas, every year for ever, among the poor of a parish. *Held*, that, as there was a gift to A., the gift to the poor did not fail by reason of its being a gift of residue after a void gift, and that there was a good gift of the whole to the charity, discharged from the obligation to repair the grave.—*Fisk* v. *Attorney-General*, Law Rep. 4 Eq. 521.

3. A testator gave funds to the President and Vice-President of the United States and the Governor of Pennsylvania, and directed that moral philosophy should be taught therein, and a professor engaged to inculcate and advocate the natural rights of the black people, of every clime and country, until they be restored to an equality of right with their white brethren throughout the Union. The trustees declined to accept the trust. *Held*, that, the court having no power to enforce the trust, nor to settle a scheme *cy près*, the object had failed, and the fund fell into the residue.—*New* v. *Bonaker*, Law Rep. 2 Eq. 655.

See Mortmain.

Circular Notes.—*See* Bills and Notes.

Common Carrier. — *See* Negligence; Railway, 1, 2.

Company.

1. A. was induced to take shares in a company by fraudulent concealments in the prospectus. In nine months, the company failed. *Held*, that A. was not then entitled to relief as

against creditors, but was liable as a contributory.—*Oakes* v. *Turquand*, Law Rep. 2 H.L. 325.

2. A., having obtained judgment against a limited company for £11,000, moved for a *scire facias* against a shareholder. The company had no assets in England, but had £500 assets in Ireland. There were other large creditors, one of whom had obtained by consent a rule absolute for a *scire facias*, with immediate execution against same sharehold, but the execution had not issued, nor had the amount been paid. A. had obtained rules, which had not been argued, for writs of *scire facias* against other shareholders, to the amount of £30,000. *Held*, that the *scire facias* should issue.—*Rigby* v. *Dublin Trunk Railway Co.*, Law Rep. 2 C. P. 586.

3. After a rule *nisi* had been obtained by a judgment creditor of a company against a shareholder for a *scire facias*, the shareholder *bona fide* paid the amount due on his shares to another creditor of the company, who had obtained a *scire facias* against him, but had not issued execution. The court discharged the rule with costs.—*Kernaghan* v. *Dublin Trunk Connecting Railway Co.*, Law Rep. 3 Q. B. 47.

See Mortmain.

Concealment.—*See* Company, 1.

Confession.

The prisoner's master called him up, and said, "You are in the presence of two police officers; and I should advise you, that, to any question put to you, you will answer truthfully, so that, if you have committed a fault, you may not add to it by stating what is untrue." He afterwards added, "Take care: we know more than you think." *Held*, that a statement then made by the prisoner was admissible against him on his trial for larceny.—*The Queen* v. *Jarvis*, Law Rep. 1 C. C. 96.

Conflict of Laws.—*See* Equity Pleading and Practice.

Contract.

The plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular parts, the price to be paid on the completion of the whole. After some parts had been finished, but before the whole was completed, the premises were destroyed by an accidental fire. *Held* (reversing the judgment of the Common Pleas), that the plaintiffs could not recover for those parts of the work which had been completed, whether the materials used had become the property of the defendant or not. (Exch. Ch.)—*Appleby* v. *Myers*, Law Rep. 2 C. P. 651.

See Mistake; Partnership; Railway, 2; Sale,

Contributory.—*See* Company, 1.

Conversion.—*See* Administration, 3.

Copyright.

The plaintiff registered, under the Copyright of Designs Act, a piece of cloth having woven on it a chain-work ground, with shaded and bordered six-pointed stars arranged in a quincunx. There was no written description. *Held*, that this was sufficient registration of the entire pattern, as the "design;" but that the whole combination only, and not single parts, though new, were protected.—*Holdsworth* v. *McCrea*, Law Rep. 2 H. L. 380.

Corporation.—*See* Company.

Corpus.—*See* Administration, 1, 2; Annuity; Legacy, 1.

Costs.—*See* Bankruptcy, 2; Champerty; Trust, 4.

Covenant.—*See* Landlord and Tenant, 2, 3.

Criminal Law.—*See* Appeal; Confession; Evidence; Indictment; New Trial; Perjury.

Cross Remainder.—*See* Devise, 2.

Custom.—*See* Support.

Cy près.—*See* Charity, 3; Devise, 2.

Damages.

1. In a suit to establish the right to coal mines, it appeared that the defendant had worked them *bona fide*, and not fraudulently. *Held*, that, in assessing compensation for coal already gotten by the defendant, he should not be charged the full value of the coals without deducting the cost of obtaining them, but only the fair value of the coal, as if he had purchased the mine from the plaintiff.—*Hilton* v. *Woods*, Law Rep. 4 Eq. 432.

2. The works of a railway company diminished the light to the plaintiff's premises, whereby they were rendered less convenient for the requirements of his trade; but the saleable value of the plaintiff's interest in the premises was not diminished, property in the neighbourhood generally having been enhanced by reason of the works. Under a statute giving compensation to persons whose interest in land was injuriously affected by the works, *held*, that the plaintiff was entitled to compensation.—*Eagle* v. *Charing Cross Railway Co.*, Law Rep. 2 C. P. 638.

See Landlord and Tenant, 2; Railway, 1; Sheriff, 1.

Death.—*See* Presumption.

Deed.

On the marriage of A., tenant for life of X. estate, with remainder in his first and other sons in tail male, personal estate was settled

(in case there should be children, other than a son, for the time being entitled to X., estate, for an estate in tail male in possession, or remainder immediately expectant on A.'s death) on such children, in such shares as A. should appoint, and in default of appointment equally. C., the eldest son of the marriage, joined with A. in barring the entail, and resettling the estate to A. for life, then to C. for life, with remainder to C.'s issue in tail general, remainder to A.'s heirs. *Held*, on A.'s death, that that was the period for ascertaining whether C. should be excluded, and that therefore he was entitled to share in the personal estate; the fact that his being only tenant for life arose from his own act did not exclude him.—*Stanhope* v. *Collingwood*, Law Rep. 4 Eq. 286.

See MISTAKE; PLEADING, 1.

DEPOSITION.

By 1 Wm. IV., c. 22, sec. 4, a judge may issue commissions to examine witnesses abroad, and may give all such directions touching the time, place and manner of the examination, and all other matters and circumstances connected with the examination, as may appear reasonable and just." A judge's order under this statute provided that the deposition of every witness should be signed by him. The commission contained no such clause. *Held*, that the clause was merely directory, and a non-compliance with it did not render the deposition inadmissible.—*Hodges* v. *Cobb*, Law Rep. 2 Q. B. 652.

DEVISE.

1. Testator devised all his "freehold land, situate and being in, or forming the whole or part of" a certain block of buildings. Part of this block the testator owned in fee, subject to a lease; of a second part he had a term for years; of the remaining part (x) he had a term for years, and also the reversion in fee from the expiration of three years from the end of his term. *Held*, that both his leasehold and freehold interest in X. passed under the devise. —*Mathews* v. *Mathews*, Law Rep. 4 Eq. 278.

2. Devise in trust for A. for life, remainder in trust for B., C. and D., and the survivor, for their lives and the life of the survivor, and for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue or on the death of all their issue; and a direction that the before-stated entails to B., C. & D., and their respective issues, should be equally divided among the daughters as well as the sons of them an their issue. *Held*, that the doctrine of *cy près* was applicable to such devise; that B., C. and D. took equitable estates in remainder for their lives and the life of the survivor, with cross-remainders between them; and that, on the death of the survivor, all the children of B., C. and D. took equitable estates as tenants in common in tail, with cross-remainders between them in tail.—*Parfitt* v. *Hember*, Law Rep. 4 Eq. 443.

See LEGACY; VESTED INTEREST, 1; WILL, 5.

DISCOVERY.—*See* EQUITY PLEADING AND PRACTICE.

DISCRETION.—*See* TRUST, 4.

DIVORCE.

1. A man, having married a woman of loose character, with whom he had been co-habiting, separated from her against her will soon after the marriage, and sent her to live by herself, in a place where she would be accessible to temptation, and where she committed adultery. There was no evidence of any reasonable cause for the separation. *Held*, that this was conduct conducting to her adultery, and that a petition by the husband for dissolution of marriage should be dismissed.—*Baylis* v. *Baylis*, Law Rep. 1 P. & D. 395.

2. The pension of a retired naval officer, received solely in respect of past services, is liable to sequestration for alimony.—*Dent* v. *Dent*, Law Rep. 1 P. & D. 366.

EASEMENT.

The defendant, the owner of a mill where paper had been made from rags, introduced a new vegetable fibre, and carried on the works on the same scale for making paper from this new material. For more than twenty years before this change, the refuse from the mill had been discharged into a stream that ran past the plaintiff's house. *Held*, that the defendant's easement was to be presumed to be, not a right to discharge into the stream the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing the pollution, and that the burden lay on the plaintiff to prove any such increase.—*Baxendale* v. *McMurray*, Law Rep. 2 Ch. 790.

See LIGHT.

ELECTION.—*See* MARSHALLING.

EQUITY.—*See* LEASE.

EQUITY PLEADING AND PRACTICE.

To a bill by the United States, praying an account of all moneys received by the defendant as agent in England of the so-called Confederate States, and for consequential relief, the defendant pleaded to the whole of the dis-

covery and relief, that, by an act of Congress, the property of all agents of the Confederate Government was liable to confiscation, and that proceedings *in rem* were pending in the United States to confiscate his property on the ground of such agency. The plea was allowed, on the ground that the plaintiffs were not entitled to the aid of equity to obtain the money held by the defendant as agent, without waiving the forfeiture to which his agency exposed him in the United States.—*United States of America* v. *McRae*, Law Rep. 4 Eq. 327.

See Vendor and Purchaser of Real Estate.

Estate by Implication.—*See* Will, 5.

Estate Tail.—*See* Devise, 2.

Evidence.

1. The prisoner, an attorney, was indicted for perjury in having sworn that there was no draft of a certain paper made by his client. No notice to produce the draft had been given to the prisoner; and, on his trial, it was proved to have been last seen in his possession. *Held*, that secondary evidence of its contents was inadmissible. — *The Queen* v. *Elworthy*, Law Rep. 1 C. C. 103.

2. On a trial for felony in a colony, the jury disagreed; on a new trial, some of the witnesses having been resworn, their evidence on the former trial was read to them from the judge's notes, both the prosecution and the prisoner having liberty to examine and cross-examine. *Semble*, that this was irregular, and could not be cured by the prisoner's consent.—*The Queen* v. *Bertrand*, Law Rep. 1 P. C. 520.

See Confession; Deposition; Easement; Insanity; Master and Servant; Negligence; Perjury; Presumption; Sale, 2.

Execution.—*See* Assignment, 3; Bankruptcy, 3; Company, 2, 3; Divorce, 2; Sheriff, 1.

Executor and Administrator.—*See* Administration; Limitations, Statute of.

Factor.

The Factors' Act (5 & 6 Vic. c. 39) provides in sec. 1, that a pledge of goods by a factor, as well for any original loan, advance, or payment, made on the security of such goods, as also for any further or continuing advance in respect thereof, shall be valid; and, in sec. 3, that the act shall not extend to any pledge for, or in respect of, any antecedent debt, owing from the factor to the pledgee, but that for the purpose of protecting all such *bona fide* loans, advances, and exchanges as aforesaid, and to no further or other intent or purpose, such contracts shall be valid. A., a factor, pledged goods of his principal to B.; first, to secure the payment of an acceptance of A. in B.'s hands, not then due, which had been given to protect B.'s liability on a contract as A.'s broker; secondly, to repay to B. his loss on a resale of goods which B. had purchased for A. in his own name, and which had not been paid for. *Held*, that the pledge was not protected by the Factors' Act; and *semble*, that both liabilities were antecedent debts.—*Macnee* v. *Gorst*, Law Rep. 4 Eq. 315.

Foreign State.—*See* Equity Pleading & Practice.

Forfeiture.—*See* Equity Pleading and Practice.

Husband and Wife.—*See* Ademption, 2; Landlord and Tenant, 3; Trust, 1, 2; Voluntary Conveyance.

Implied Estate.—*See* Will, 5.

Income. — *See* Administration, 1–3; Annuity; Legacy, 1.

Indictment.

An indictment, charging the prisoner with neglect to provide food and clothing for his child, sufficiently avers his ability to provide, it being implied in the word "neglect."—*The Queen* v. *Ryland*, Law Rep. 1 C. C. 99.

Injunction.—*See* Nuisance.

Insanity.

If the disease be once shown to exist in the mind of a testator, it matters not that it is discoverable only when the mind is addressed to a certain subject, to the exclusion of all others, or that the subject on which it is manifested has no connection with the testamentary disposition; and, if a diseased state of mind is proved to have once existed, the burden of proving restored health lies on those who assert it.

The tests of insanity considered.

The question of insanity is a mixed one, within the range partly of common observation and partly of special medical experience; and the court, in searching for a conclusion, must inform itself of the general results of medical observation, and must make a comparison between the sayings and doings of the testator at a time when the disease is alleged to exist, and (1) his sayings and doings at a time when he was sane, or the sayings and doings of those persons whose general temperament and character bear the closest resemblance to his own, and (2) the sayings and doings of insane persons.—*Smith* v. *Tebbitt*, Law Rep. 1 P. & D. 398.

Interest.—*See* Administration, 2, 3; Legacy, 2.

Jurisdiction.—*See* Admiralty; Appeal; License; Perjury, 2.

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Landlord and Tenant.

1. An agreement for the sale of a house by S. to E. provided, that, inasmuch as E. was to be let into immediate possession, E. "admits himself to be a tenant from week to week to S." of the premises agreed to be sold, at a certain weekly rent. *Held*, that this created the relation of landlord and tenant between S. and E., with right to distrain.—*Yeoman* v. *Ellison*, Law Rep. 2 C. P. 681.

2. The defendant demised premises to the plaintiff, and covenanted that the plaintiff should occupy during the term, without any interruption from the defendant or those lawfully claiming under him. The plaintiff erected a conservatory on the land. Afterwards, a person claiming under the defendant brought an action of trespass against the plaintiff, who notified the defendant. The defendant paid no attention to the notice, and the plaintiff defended the action. A verdict was found against him, and he had to pay damages and costs. In an action against the defendant for breach of the covenant, *held*, (1) that the plaintiff could recover compensation for his expenses in building the conservatory; (2) (Channell and Pigott, B. B., doubting) that he could recover the damages and costs he had paid, and also his expenses in defending the action.—*Rolph* v. *Crouch*, Law Rep. 3 Ex. 44.

3. Husband and wife seized in fee in right of the wife, in April, 1860, by indenture demised land to C. for seven years, and C., and the defendant as his surety, covenanted to pay rent during the term. The deed was executed by all the parties; but the wife did not acknowledge it, as provided by statute. The lessee entered and occupied till August, 1866, when he left. The husband died in January, 1866, and the wife in January, 1867. The wife's executors sued the defendant on the covenant to recover rent due in June, 1866. *Held*, that the contract must be taken to have been for a term for seven years, terminable, at the option of the wife, after the death of the husband; and that, as the wife had allowed the lessee to retain possession, the lease was subsisting up to her death, and the plaintiffs could recover.—*Toler* v. *Slater*, Law Rep. 3 Q. B. 42.

Lease.

The plaintiff held land under a lease, which it was doubtful whether he had a right to have renewed in 1885. A railway company took the land, paying the price of his present term, and agreeing to pay him a further amount (to be settled by arbitration) in case he should substantiate his right to a renewal. The company afterwards bought the reversion in fee. The plaintiff filed a bill against the company, praying a declaration of his right to a renewal and payment accordingly. *Held*, that the bill was maintainable. — *Bogg* v. *Midland Railway Co.*, Law Rep. 4 Eq. 310.

See Landlord and Tenant; Will, 3.

Legacy.

1. In June, 1865, a dividend on certain shares held by the testatrix was declared, payable in July, 1865, and January, 1866. Testatrix died in December, 1865. *Held*, that the January dividend formed part of the *corpus* of her estate, and did not pass under a bequest of the annual income of such estate.—*De Gendre* v. *Kent*, Law Rep. 4 Eq. 283.

2. A testatrix, having a power to appoint property which was the subject of litigaton, appointed it to A. "on trust, that, so soon as proceedings in law and equity shall be terminated, and the same shall come into his possession, that then he shall pay" certain legacies, "and as to the residue on other trusts." *Held*, that the legacies did not carry interest till the litigation ended, which was not till eighteen years after the death of the testatrix.—*Lord* v. *Lord*, Law Rep. 2 Ch. 782.

3. A testator charged the share of a residuary legatee with money due to him from the legatee on the security of a bond, and all interest thereon. The debt and interest exceeded the penalty. *Held*, that only the amount of the penalty could be deducted from the share.—*Mathews* v. *Keble*, 4 Eq. 467.

4. A testator gave £2,000 in trust for A. for life, remainder to her children; and, if she died without issue, then "to the next personal representatives" of A. A. died without issue, leaving a husband, a brother, a sister, and the child of a deceased sister. *Held*, that "next personal representatives" did not mean "executor or administrator," nor did it mean "next of kin according to the Statute of Distributions," but that it meant "nearest of kin," and that therefore the brother and sister were entitled as joint tenants.—*Stockade* v. *Nicholson*, Law Rep. 4 Eq. 359.

See Ademption; Administration, 1, 4; Charity; Devise; Perpetuity; Trust, 3; Vested Interest, 2; Will, 5.

License.

A. was licensed to sell beer not to be drunk on the premises; A.'s servant handed beer in a mug of A.'s through an open window in A.'s premises to a person who, after paying for it, drank it immediately, standing on the highway, close to the window. *Held*, that A. could not

be convicted of "selling beer to be consumed on the premises where sold.—*Deal* v. *Schofield*, Law Rep. 3 Q. B. 8.

Light.

To establish the right to an extraordinary amount of light necessary for a particular purpose, the user of such extraordinary amount, as at present enjoyed and claimed, must be shown for the period of prescription.—*Lanfranchi* v. *Mackenzie*, Law Rep. 4 Eq. 421.

See Damages, 2.

Limitations, Statute of.

1. If an executor, in his discretion, pays a debt barred by the Statute of Limitations, he will be allowed the payment, if the personal estate is insufficient, against the devisees of real estate.—*Lowis* v. *Rumney*, Law Rep. 4 Eq. 451.

2. A., a tenant for life impeachable for waste, cut timber without the leave of the court. Afterwards, the remainder-man died, and A. took out administration. *Held*, (1) that the right to the timber when cut passed to the administrator, and not to the heir of the remainder-man; and (2) that, the act of cutting being wrongful, the Statute of Limitations began to run from the time of cutting, but that the running of the statute was suspended during the administration. — *Seagram* v. *Knight*, Law Rep. 2 Ch. 628. [This decision, that the running of the statute is suspended by a debtor taking out administration to his creditor, has excited much surprise and comment in England.]

Maintenance.—*See* Champerty; Marshalling.

Malicious Prosecution.

No action lies for a malicious prosecution unless the prosecution has failed, even though the plaintiff has been convicted under a statute giving no appeal. — *Basebe* v. *Matthews*. Law Rep. 2 C. P. 684.

Mandamus.—*See* Pleading, 2.

Married Woman.—*See* Ademption, 2; Landlord and Tenant, 3; Trust, 1, 2; Voluntary Conveyance.

Marshalling.

A., domiciled in England, settled a Scotch estate in trust, among other things for the maintenance of his children. He then made an English will, not attested so as to pass real estate in Scotland, in which he declared, that the will should not affect the settlement of the Scotch estate. He charged his residuary real and personal estate with payment of his debts, and provided for the payment of his children. He afterwards charged the Scotch estate with £14,000 by a Scotch heritable bond. Still later he purchased other land in Scotland, which passed by intestacy to his heir. *Held*, (1) that the residuary estate should pay the £14,000 in exoneration of the Scotch estate; (2) that the heir could take the after-acquired estate in the same manner as if there was no will, and that he was not put to his election; (3) that the provisions for maintenance in the will were additional to those in the settlement. —*Maxwell* v. *Hyslop*, Law Rep. 4 Eq. 407.

Master and Servant.

An action will lie for enticing away the plaintiff's servant, his daughter, though it be not alleged that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff.

The plaintiff's daughter, nineteen years old, resided with him and assisted him in his business. By a fictitious letter, dictated by the defendant, she procured her mother's consent to leave home for a few days, when she left, and the defendant took her to a lodging-house, where he cohabited with her for nine days. She then returned home. *Held*, that there was a sufficient continuing relation of master and servant, and sufficient evidence of a wrongful enticing away, to maintain the action.—*Evans* v. *Walton*, Law Rep. 2 C. P. 615.

Mines—*See* Damages, 1; Support.

Misrepresentation.—*See* Company, 1.

Mistake.

More land was conveyed by a deed than the vendor intended to convey. Though the mistake was not common to both parties, the court made a decree to rectify the deed, giving an option to the purchaser to annul the contract. —*Harris* v. *Pepperell*, Law Rep. 5 Eq. 1.

Mortgage.

1. Several mortgages of different estates by the same mortgagor had become united in the plaintiff. The mortgagor had conveyed the equity of redemption in some of the estates to purchasers by deeds of various dates. In a suit for foreclosure: *Held*, (1) that no purchaser could redeem his estate without redeeming all the mortgages, whether he had purchased before or after the union of the mortgages in the plaintiff, and whether he had or had not had notice of such mortgages; (2) that the first purchaser of part in point of date had the first right of redeeming all the mortgages, and, in default, the subsequent purchasers had successive rights of redemption. — *Beevor* v. *Luck*. Law Rep. 4 Eq. 537.

2. A., having contracted to purchase an advowson, borrowed from B. £2,500, and covenanted to pay for the advowson, and convey it

to him as security within six months. A. purchased the advowson, but never conveyed it under the covenant. Subsequently, he borrowed £1,000 from C., and covenanted to convey the advowson to him as security, and deposited with him the title deeds, but did not convey the legal estate. *Held*, that the first mortgage must be postponed to the second.—*Layard* v. *Maud*, Law Rep. 4 Eq. 397,

See Marshalling.

Mortmain.

Shares in the A. company, the business of which was purchasing and improving lands, and selling or letting the same, and in the B. Society, established for raising a fund out of which any member should receive the amount of his share "for the erection or purchase of a house, or other real or leasehold estate," are not within the Statute of Mortmain.—*Entwhistle* v. *Davis*, Law Rep. 4 Eq. 272.

Navigable Waters.—*See* Prescription.

Negligence.

Goods were shipped under a bill of lading containing an exception from liability for "breakage, leakage or damage.' The goods were found to have been injured by oil. It was proved that they were sound when shipped, that there was no oil in the cargo, but that there were two engines near where the goods were stowed, in lubricating which oil was used. There was no evidence of how the injury occurred. *Held*, that the ship-owners, notwithstanding the exception, were responsible for their servants' negligence, and that the above facts were evidence on which a jury were justified in finding negligence.—*Czech* v. *General Steam Navigation Co.*, Law Rep. 3 C. P. 14.

See Mortgage, 2; Railway, 2, 3.

New Trial.

The court cannot grant a new trial, on the application of the prisoner, in a case of felony.—*The Queen* v. *Bertrand*, Law Rep. 1 P. C. 520.

Notice.—*See* Assignment, 3; Evidence, 1.

Nuisance.

The collection of a disorderly crowd outside grounds in which entertainments with music and fireworks are being given by A. for profit, is a nuisance, for which A. is liable to injunction at the suit of the owners of the neighbouring premises, though A. has excluded all improper characters from the grounds, and the amusements within the grounds have been orderly. *Semble*, that letting off rockets, and establishing a powerful band of music, which plays twice a week for several hours continuously within a hundred yards of a house, will be restrained by injunction.—*Walker* v. *Brewster*, Law Rep. 5 Eq. 25.

See Easement; Pleading, 2.

Pardon.—*See* Appeal, 2.

Parent and Child.—*See* Indictment; Master and Servant.

Parties.—*See* Vendor and Purchaser of Real Estate.

Partnership.

A. and B., partners, agreed that if B. wished to retire, he should give notice, and that A. should have the option to purchase within six months after notice; the partnership property, contracts, &c., to be valued "in the usual way," by two valuers, one to be named by A., the other by B., or the umpire of the two valuers. B., wishing to retire, and A. to purchase, the two valuers were appointed, but B. afterwards refused to allow his valuer to proceed. *Held*, that there was no contract which could be specifically enforced.—*Vickers* v. *Vickers*, Law Rep. 4 Eq. 529.

Patent.—*See* Copyright.

Penal Action.

An informer having recovered from the defendant the penalty of £100 for keeping a house for dancing without the requisite yearly license, *held*, that a second action by another informer to recover a like penalty was not maintainable.—*Garrett* v. *Messenger*, Law Rep. 2 C. P. 583.

Penalty.—*See* Legacy, 3.

Perjury.

1. On the trial of S. for robbery, A., in support of an *alibi*, swore (1) that S. was in a certain house at the time of the robbery; (2) that S. had lived in that house for the last two years; and (3) that S. had never been absent from it more than two or three nights together during that time. In fact, S. had been in prison during one of the two years. *Held*, that the second and third statements were material as tending to make the first more credible, and that A. was rightly convicted of perjury assigned on them.—*The Queen* v. *Tyson*, Law Rep. 1 C. C. 107.

2. The prisoner was convicted of perjury, committed on the hearing of an application for an order of affiliation. The information was proved, and it was shown that the putative father appeared, and that evidence was given on both sides. To give the justice jurisdiction, it was necessary that a summons should have been served on the putative father. *Held*, that the father having appeared, and not having raised any objection to the summons, no evi-

dence of its existence need be given on the trial for perjury.—*The Queen* v. *Smith*, Law Rep. 1 C. C. 110.

See Evidence, 1.

Perpetuity.

A testator directed trustees to apply so much as was necessary of the income of his residuary personal estate for the maintenance of A., a lunatic, and to invest any surplus, and treat it as part of the testator's personal estate, which was given over after A.'s death. *Held*, that, under the Thelluson Act, the direction to invest the surplus was void beyond the period of twenty-one years, and that the testator's next of kin were entitled to the accumulations.—*Mathews* v. *Keble*, Law Rep. 4 Eq. 467.

Pleading.

1. By the Irish Registration Act, cap. 2, a registered deed is good and effectual according to the time of registration, and all prior unregistered deeds are void as against the registered deed. *Held*, that under a plea which was in form a bar of the action, and which alleged the time of registration under a *videlicet*, proof of the registration of a deed which really defeated the action might be given, though the deed was not in fact registered till after the commencement of the action, though before plea pleaded. —*Carlisle* v. *Whaley*, Law Rep. 2 H. L. 391.

2. A. complained in a *mandamus* against the trustees of a navigation, that there were sluices near his land under the management of the trustees; that, owing to heavy rains, the water had risen; that the sluices were not raised to such a height to let off the water, as they ought to have been, and, but for possible damage to works of the trustees in another place, would have been; whereby he suffered damage; but he did not allege that the effect of the sluices was to raise the water higher than it would have risen had they not existed. The issue on the return and pleadings was, whether the damage was occasioned on account of the navigation. *Held*, that the allegations, though they might have been insufficient on demurrer, were, after verdict, sufficient to warrant judgment for A.—*Lord Delamere* v. *The Queen*, Law Rep. 2 H. L. 419.

See Equity Pleading and Practice.

Pledge.—*See* Bill of Lading; Factor.

Power.—*See* Trust, 1.

Prescription.

A claim for anchorage dues on a navigable arm of the sea, if it is presumably capable of a legal origin, and if the dues have been paid time out of mind, will have every intendment made in its favor. It cannot be supported in respect of the mere ownership of the soil; but such ownership, together with the maintenance of buoys from time out of mind, and the benefit to the public therefrom, are a sufficient consideration to support the claim. —*Whitstable Fisher* v. *Foreman*, Law Rep. 2 C. P. 688.

See Easement; Light.

Presumption.

If a man has not been heard of for seven years, there is no presumption of his death till the end of that time; and those alleging his death within that time must prove it. Therefore, a legacy left to a man last heard of in 1854, by a testator who died in 1860, was *held* not to have lapsed, but to be payable to his representatives.—*In re Benham's Trust*, Law Rep. 4 Eq. 416.

See Easement; Insanity; Revocation of Will.

Principal and Agent.—*See* Factor.

Priority.—*See* Mortgage, 2.

Promissory Notes.—*See* Bills and Notes.

Railway.

1. A. was travelling with others in a railway carriage; on the tickets being collected, there was one ticket short. The collector charged A. with being the defaulter, and, on his refusing to pay the fare or leave the carriage, removed him from the carriage, but without any unnecessary violence. A. left behind him a pair of opera-glasses. It turned out that A. had a ticket; and he sued the company for the assault, laying the loss of the glasses as special damage. There was also a count in trover, but there was no evidence that the glasses had come to the possession of any of the company's servants. *Held*, that A. could not recover for the loss of the glasses.—*Glover* v. *London and S. W. Railway Co.*, Law. Rep. 3 Q. B. 25.

2. The plaintiff's goods were carried by the defendants, carriers in India, under a contract with the Government, bywhich the baggage of certain troops (including the plaintiff's goods) were to remain in charge of a military guard, "the company accepting no responsibility;" whilst being so carried, the goods were destroyed by the defendants' negligence. *Held*, (1) that the defendants were liable for a loss occurring wholly from their own negligence; (2) (Kelly, C.B., and Pigott, B., doubting) that, though the plaintiff could not sue the defendants for non-performance of their contract, he could sue for an injury to his goods through their negligence while the goods were in their custody.—*Martin* v. *Great Indian Peninsular Railway Co.*, Law Rep. 3 Ex. 9.

3. A railway, consisting of several lines, crossed a public foot-path near a station; but the crossing was not otherwise dangerous There were sufficient swing-gates, as required by statute. The railway company, as an extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S. found the gate unfastened, and a train standing in front of it. He waited till the train moved off, and then, without looking along the line, commenced crossing, and was killed by a passing train. Had he looked along the line, he would have seen the train in time to stop. In an action by his administrator, under Lord Campbell's Act, a nonsuit was ordered. *Held*, that S. had contributed by his negligence to the accident, and that the nonsuit was right. By Willes, J., that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate was not an invitation to come on the line; and that therefore the company would not have been liable, even without negligence on S.'s part.—*Skelton* v. *London and N. W. Railway Co.*, Law Rep. 2 C. P. 631.

Registration.—*See* Pleading, 1.

Revocation of Will.

A will which had been in the testator's custody could not be found among his papers after his death; he had recognized its existence up to three weeks of his death, and no change of intention was shown during those weeks; the only person interested in an intestacy had had access to and had searched the testator's papers before any other person, and did not appear in court. The court refused to presume that the will had been revoked, and granted probate of the draft.—*Finch* v. *Finch*, Law Rep. 1 P. & D. 371.

Sale.

1. The plaintiff sold the defendants 128 bales of cotton, marked $\frac{D. C.}{a}$ at 25*d.* per lb., "expected to arrive per Cheviot, the cotton guaranteed equal to sample. Should the quality prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton. The 128 bales, marked $\frac{D. C.}{a}$ which arrived by the Cheviot, contained "Western Madras" cotton. Western Madras cotton is inferior to Long-staple Salem, and requires different machinery for its manufacture. *Held*, that the defendants were not bound to receive the cotton, the allowance clause referring to inferiority of quality only, not to difference of kind.—(Exch. Ch.) *Azemar* v. *Casella*, Law Rep. 2 C. P. 431.

2. A boiler set in brickwork, and capable, if taken to pieces, of being removed without injury to the premises, had been seized and sold under a distress, bought by the defendant, and sold by him to the plaintiffs at an advanced price, with notice of the circumstances under which he had bought it, the plaintiffs to remove it at their own expense. The mortgagees of the premises having prevented the plaintiffs from carrying the boiler away, the plaintiffs sued the defendant, relying on an alleged implied warranty that he had a good title, and that the plaintiffs should be allowed to remove the boiler. The jury found for the plaintiffs. *Held* (by Bovill, C. J., and Montague Smith, J.; Willes, J., dissenting), that there was no evidence to justify the jury in finding a warranty as alleged. [The judge at *nisi prius* assumed the distress to have been legal, but its legality seems not to have been considered *in banc.*]—*Bagueley* v. *Hawley*, Law Rep. 2 C. P. 625.

See Stoppage in Transitu.

Scire Facias.—*See* Company, 2, 3.

Seduction.—*See* Master and Servant.

Sequestration.—*See* Divorce, 2.

Servant.—*See* Master and Servant.

Set-off.—*See* Administration, 4; Assignment, 1; Bankruptcy, 2.

Settlement.—*See* Deed.

Sheriff.

1. An action cannot be maintained against a sheriff for negligence in not levying under a *fi. fa.* without showing actual pecuniary damages; and though *prima facie* the measure of damage is the value of the goods which might have been levied on, yet it is for the jury to say, looking at the probabilities of the case, whether or not, if the execution had been levied, the plaintiff would have derived any benefit from it, by reason of the other creditors being in a position to make the debtor a bankrupt.—*Hobson* v. *Thelluson*, Law Rep. 2 Q. B. 642.

2. A., having been arrested by a sheriff's officer under a *capias* to hold to bail against another person, protested that he was not the right person; but, to obtain his release, he paid the sum indorsed, and the officer released him under the 43 Geo. III. c. 46, s. 2. The money having been paid into court by the sheriff, a summons was served on A. to show cause why the money should not be paid to the person at whose suit he was arrested. A. did not appear, and the money was paid to such person. *Held*, that A. could recover the amount so paid from the sheriff, together with damages for the arrest.—*De Mesnil* v. *Dakin*, Law Rep. 3 Q. B. 18.

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Ship.—*See* Admiralty; Negligence; Stoppage in Transitu.

Solicitor.—*See* Bankruptcy, 2; Champerty.

Specific Performance.—*See* Partnership.

Statute.

The fifth section of a statute provided, that, if in any of a certain class of actions, "commenced after the passing of this act," the plaintiff did not recover a certain amount, he should have no costs. A subsequent section of the same act provided that "this act shall come into operation on the 1st day of January next after the passing thereof." The act was passed in August, 1867. *Held*, that the fifth section did not come into force till the 1st of January, 1868.—*Wood* v. *Riley*, Law Rep. 3 C. P. 26.

Statute of Limitations.—*See* Limitations, Statute of.

Stoppage in Transitu.

A., in Sweden, agreed to sell goods to B., in London, the price of the goods to be "free on board." payable by B.'s acceptance of A.'s drafts at six months from the date of bills of lading, ships to be provided by A By a subsequent agreement, a ship was chartered by B., on which the goods were shipped by A., who had the bills of lading drawn in his name as shipper, deliverable "to order or assigns." The bill of lading was indorsed in blank by A., and sent to B. in return for his acceptance of a bill of exchange drawn on him by A. The ship put into Copenhagen in distress, and, while it was there, B. stopped payment, and A. gave notice of stoppage *in transitu*. *Held*, that the effect of the delivery of the goods on board a chartered ship, coupled with the form of the bills of lading, was to interpose the master as a carrier between A. and B., and that A. had an equitable right to stop *in transitu* as against B. —*Berndtson* v. *Strang*, Law Rep. 4 Eq. 481.

Support.

If A. sells land to B., reserving the mines and minerals, with a right of user of the surface for the purpose of working the mines, A. has no right to cause a subsidence of the surface, though he cannot work the mines at all without causing such subsidence, and injunction will be granted accordingly. *Semble*, that a custom as between the owner of the surface and the owner of the mines, entitling the latter to cause a subsidence of the surface, if necessary in working his mines, is bad and void.—*Wakefield* v. *Duke of Buccleuch*, Law Rep. 4 Eq. 613.

Tail, Estate in.—*See* Devise, 2.

Tenant for Life and Remainderman.—*See* Administration, 1–3; Limitations, Statute of, 2.

Timber.—*See* Limitations, Statute of, 2.

Trust.

1. A power for setting up children in business does not entitle trustees to make advances for such purpose to a married daughter, nor for the purpose of paying the debts of a daughter's husband.—*Talbot* v. *Marshfield*, Law Rep. 4 Eq. 661.

2. A married woman consented, before commissioners, to the transfer and payment to her husband of sums of stock and cash standing in court to her separate account. *Held*, that this was not such a declaration of trust but that she might, at any time before the transfer, retract her consent.—*Penfold* v. *Mould*, Law Rep. 4 Eq. 562.

3. A testator gave £2,300. bank annuities, to trustees on trust to pay his debts, if his ready money was insufficient, and to invest the residue, and to pay the interest to his wife for life, and on her death to pay seven legacies, amounting to £1,075, and the residue to A. The testator died in 1832, the estate was completely administered, and, no part being required for debts, the £2,300 was appropriated as trust funds, and transferred into the names of the trustees on the trusts of the will. Both trustees died, and the administrator of the survivor embezzled the greater part of the funds, so that only £716 were forthcoming. The widow died in 1862. *Held*, that there having been a complete appropriation of the fund, awaiting only the period of distribution, and there being no deficiency of assets, the pecuniary legatees must abate, *pari passu*, with the residuary legatee.—*Baker* v. *Farmer*, Law Rep. 4 Eq. 382.

4. If, after the institution of an administration suit, trustees exercise their discretion by making advances, the court will require the clearest evidence that they have acted *bona fide;* and the court being of opinion, in this case, that they had exercised a discretionary power, not *bona fide*, but in order to defeat the plaintiff's interest, ordered the amount of the advances to be restored, and that the trustees should pay the costs.—*Talbot* v. *Marshfield*, Law Rep. 4 Eq. 661.

See Annuity; Assignment, 2, 3; Charity; Devise, 2; Legacy, 2.

Vendor and Purchaser of Real Estate.

A bill was filed by an unpaid vendor against two railway companies, the purchasers, and their lessees in possession, for specific performance and payment, for an injunction against both companies, for a declaration of lien, and that it might be enforced by a sale, and for the appointment of a receiver of the profits of the

land. *Held*, that the lessees were properly made parties.—*Bishop of Winchester* v. *Midhants Railway Co.*, Law Rep. 5 Eq. 17.

See Mistake.

Vested Interest.

1. Testator devised certain land to trustees, on trust for his daughter R. for life, and, after her death, he gave the same to her children; if more than one, as tenants in common, their heirs and assigns; if only one, then to such child and his or her heirs and assigns; and in case R. should die "under twenty-one or afterwards, without leaving any child or children," testator gave the land to his son C., his heirs and assigns. *Held*, that "without leaving" was to be read "without having had," and that R.'s children, at their birth, took indefeasible vested remainders in fee.—*White* v. *Hill*, Law Rep. 4 Eq. 265.

2. Bequest of stock to be divided, after the death of an annuitant, between all the children of A., as they should attain his or her age of twenty-one. *Held*, that the fund was to go to such of the children of A. as were living when the first attained twenty-one, and who had attained or who should attain twenty-one.—*Locke* v. *Lamb*, Law Rep. 4 Eq. 372.

Voluntary Conveyance.

A woman being indebted to the plaintiff at the time of marriage, settled all her property (except jewels and furniture exceeding the debt in value), on failure of issue, in favor of her mother, her sister and two nieces, one of whom she had adopted as her daughter. She died without issue, leaving no assets. *Held*, that the settlement must be set aside to the extent of the plaintiff's debt.—*Smith* v. *Cherrell*, Law Rep. 4 Eq. 390.

Warranty.—*See* Sale.

Waste.—*See* Limitations, Statute of.

Watercourse.—*See* Easement; Pleading, 2.

Will.

1. A testatrix left a will, with a full attestation clause, all in her own handwriting; the only signature was in the attestation clause, and had apparently been inserted after that clause had been written. The witnesses did not know whether or not the signature was on the paper when they signed. The court *held*, that it was at liberty to judge whether the signature was on the paper at the time of attestation, and, being of opinion that it was, granted probate of the will.—*Goods of Huckvale*, Law Rep. 1 P. & D. 375.

2. A testatrix wrote three lists of legacies on three separate sheets; the first was headed, "Codicil to the will of S. P." She signed all three sheets in the presence of the witnesses, but they attested her signature to the first sheet only. There being nothing in the contents to connect the papers with each other, and the first being complete in itself, the court refused to grant probate of the other two.—*Goods of Pearse*, Law Rep. 1 P. & D. 382.

3. An agreement to lease, attested by two witnesses, contained a provision as to the application of the rent, in case of the lessor's death, the lessee being beneficially interested in such application. *Held*, that, as no part of the agreement was revokable, and as it came into operation immediately on its execution, it was not entitled to probate as testamentary.—*Goods of Robinson*, Law Rep. 1 P. & D. 384.

4. A will began thus: "I, W. M., being weak in health, have obtained permission to cease from duty for a few days; and I wish, during such time, to be removed from the brig A. to the hospital ship B., to recruit my health. I desire to defray out of my wages the expenses incurred during my absence from duty, in respect of a substitute; and, in the event of my death occurring during such time, I do hereby will and bequeath," &c. *Held*, not contingent on the event of the testator's death in the illness from which he was suffering when the will was made.—*Goods of Martin*, Law Rep. 1 P. & D. 380.

5. Testator, after giving an annuity and legacies to his wife, and an annuity to his father, left several legacies, which he wished paid after his father's death, and directed that, after his wife's death, the remainder of his property should be divided among his brothers and sisters, if living; if dead, among his nephews and nieces. *Held*, that the wife took a life-estate by implication, in the residue.—*Humphreys* v. *Humphreys*, Law Rep. 3 Eq. 475.

See Ademption; Administration; Annuity; Charity; Devise; Insanity; Legacy; Marshalling; Mortmain; Perpetuity; Revocation of Will; Trust, 3; Vested Interest.

Witness.—*See* Deposition; Evidence; Will, 2.

Words.

"*Drunk on the premises.*"—See License.

"*Freehold.*"—See Devise, 1.

"*Neglect.*"—See Indictment.

"*Next personal representative.*"—See Legacy, 4.

"*Passing of this Act.*"—See Statute.

"*Without leaving.*"—See Vested Interest, 1.

UNITED STATES REPORTS.

Bacon's Appeal.—Mary Ann Bacon's Estate.

Trusts—Executed and Executory

1. A trust to receive and pay over the income of real and personal estate to a married woman for life and at her death to convey to her right heirs in fee simple, is an active trust which does not cease on discoverture, but continues until the death of the *cestui que trust*.
2. The trust to convey to the right heirs is not an active trust, and the legal estate is executed in them.
3. The rule in Shelley's case does not apply, because the *cestui que trust* has only an equitable estate for life, while the remainder to her "right heirs" is a legal estate.
4. The act of 8 April, 1833, sect. 12, providing against a lapse, only applies to cases where a legacy is clearly given by a testator to the ancestor.

[Phil. Leg. Int., May 22, 1868.]

Appeal of George W. Bacon and others from the decree of the Orphans' Court of Philadelphia, confirming the report of the auditor in the matter of the account of the executors of Mary Ann Bacon, deceased.

The opinion of the Court was delivered May 7, 1868.

Strong, J.—There are two controlling questions in this case. The first is, whether the trust created by the will of John Warder, for the use of his daughter Mrs. Bacon, continued during her life, though she survived her husband, and the second is whether the estate given in remainder to her right heirs was legal or equitable. Upon the answers to be given to these questions depends the rightful determination of all the matters in controversy between the parties.

By the disposition first made by the testator his sons were constituted trustees of certain real estate, for the sole and separate use of Mrs. Bacon, during her natural life, and, after her decease, for the use of her husband, in case he should survive her, and, after the death of both Mr. and Mrs. Bacon, for the use of her right heirs, and to be conveyed accordingly. By this disposition, no active duties were imposed upon the trustees during the life of Mrs. Bacon. They were made mere depositaries of the title. The only conceivable purpose of the trust was to maintain a seperate use for a married women, and to protect the property against the interference of her husband. On the accomplishment of that purpose, the estate of the trustees must have ended. Consequently had this disposition of the testator's will remained unchanged, when Mrs. Bacon became discovert by the death of her husband, the legal estate would by operation of law have immediately vested in her. But the testator did not leave the matter thus. By a codicil to his will he revoked so much of it as vested any real estate immediately in either of his daughters, and in lieu thereof, he devised their portions to the same trustees, in trust to receive the income thereof, and pay it over to the daughters respectively, for the sole and separate use of each daughter during life, and then to her husband, in case a husband should survive, and after the decease of the said daughters and their husbands respectively, the said portions to be conveyed to the right heirs of the daughters respectively, in fee simple.

It is obvious that the trust substituted by the codicil is very unlike that set up, at first, by the will. It is what is denominated, an active trust. It imposed upon the trustees duties beyond that of passively holding the title. And they were constant and continuous, not at all dependent upon the coverture of Mrs. Bacon or any of the daughters. The trustees were to receive the income of the property and pay it over. For this purpose the title was given to them, and for this purpose it was necessary they should hold it during the life of the cestui que trust. Had the trust no other object than the special one of protecting the property from the seperate use of the daughters, it might have been left as it was first constituted. The imposition of a duty to receive and pay over the income would have been needless. But the injunction of active duties during the the life of each daughter evinces a purpose beyond that of maintaining separate uses. It involved the necessity of management and care of the real estate, and of preservation for those entitled in remainder. The distinction between an active and a passive trust, so well established in England, is fully recognized with us in many cases, and it is one of much importance. It was well said by Sergeant, J., in *Veaux* v *Parke*, 7 W. & S. 19, that unless the distinction between these two classes of trusts be regarded, their existence cannot be preserved. So long as active duties remain to be performed by the trustees the legal estate must continue in them to enable the performance. It cannot, therefore, be held that the purposes of the trust instituted by the testator were all accomplished when the husband of Mrs. Bacon died, and that the legal estate of the trustees then terminated. Her interest under her father's will was equitable, and the use limited for her was never executed.

The second question to be answered is whether the estate limited in remainder to her right heirs was legal or equitable. If it was legal, the rule in Shelley's case has no applicability, and Mrs. Bacon's estate was but an estate for life though a remainder was given by the will to her heirs. As already noticed the codicil directs that the titles shall be held by the trustees in trust to receive and pay over the income during the life of each daughter, and of her husband, if he should survive her, and then the portion of each to be conveyed to the right heirs of the daughter in fee simple. No other duties toward the remaindermen are prescribed, than to convey to them. The trustees were not to receive the income and pay it over to them. They were not at liberty to hold a single hour for the use of those in remainder At most they were but the conduit through which the title was to pass. Yet it must be conceded that in England the mere duty to convey, is sufficient to prevent the execution of an use under the statute of uses. There, under a trust to convey, the legal estate remains in the trustee until he makes the conveyance, the reason given being that it is necessary in order to enable the conveyance to be made. It might be doubted whether there is any such necessity, for a power would answer the requirement as well. But in this State when lands are given by will in trust to be conveyed, when no other power or duty is assigned to the trustee, when he has nothing to do with the enjoyment of the property, and is only an instru-

ment to enable the cestui que use to acquire the legal estate, it has been understood that a conveyance is unnecessary. At most it can be but a matter of form, rather than of substance. In fact such conveyances have not usually been made. Until the year 1836 we had no court of equity to compel a trustee to convey, and therefore that was considered as having been done which the trustee should have done, and with the same effect. The cestui que trust being entitled to the whole beneficial enjoyment, and the trustee having no right to interfere with it, no reason was apparent why a legal title should be held continuing in the latter. A severance of the legal right from the beneficial ownership is not to be maintained without some reason. In the case before us the purpose of the trust was accomplished when Mrs. Bacon died. The testator did not intend that the trustees should hold any estate after her death. He contemplated its immediate transmission to the remaindermen, a transmission by conveyance indeed, but no holding in trust for those in remainder. There was, therefore, nothing substantial to be secured by treating the legal estate as remaining in the trustees, and only an equitable interest in Mrs. Bacon's heirs. It is true that we have in some cases decreed conveyances from a trustee to a cestui que trust, when the purpose of a trust has been fulfilled, but this is not because the legal and equitable title remained apart. It was to dissipate a useless cloud upon the title, and make the property more marketable. We have done this when the trust had expired by limitation, and when without doubt the legal estate had passed from the trustee, though it had been given to him formally in fee simple. It is no more remarkable that a devise to trustees to convey to another should pass the legal title to that other, than a devise to trustees and their heirs for a temporary purpose vests in the trustees the legal estate only until the purpose is accomplished. In both cases the legal title remains severed from the beneficial ownership so long only as there is any useful purpose or substantial reason for maintaining a separation. Accordingly it has been held that a direction to not continue the legal estate in them, and convey after the termination of a trust, does make them trustees of the persons to whom they are directed to convey. This was noted in Nice's Appeal, 14 Wright, 143, where the question was distinctly raised in the argument and, it was assumed in Barnett's Appeal, 10 Wright, 392. The decision accords with what, it is believed, has always been considered the law in this State.

Holding then, as we do, that by the limitations of the testators will the right heirs of Mrs. Bacon took a legal estate at her death, there was no union of their estate with hers, and consequently nothing passed by her will.

Thus far we have considered only the directions of the testator respecting his real estate. The same rule is applicable to the personalty. By his second codicil the testator revoked so so much of his will as gave to either of his daughters directly any part of his personal estate, and in lieu thereof gave it in trust for the sole and separate use of the daughters, in certain proportions; the income to be received and paid over by the trustees, in the same manner as the income of his real estate during their natural lives respectively, and in case of the decease of any of his daughters, leaving a husband surviving, the income to be received and enjoyed by the husband during his life, and from and after the decease of his daughters and their husbands respectively the share of each daughter to go to her right heirs forever. The disposition is very similar to that made of the realty, and if that did not confer a fee upon Mrs. Bacon in the land, it is not easy to see how, under the second codicil, she took an absolute interest in the personalty. The rule in Shelley's case has nothing to do with the question. It is true the principle is well established that were personal estate is bequeathed in language which, if applied to real estate, would create an estate tail or a fee simple, it vests absolutely in the person who would be the devisee in tail or in fee. And this rule applies to cases which come within the rule in Shelley's case. But the words of Mr. Warder's will, we have seen, would not have given Mrs. Bacon a fee, had the subject of the gift been realty. Besides, the principal stated is not entirely without exception. A very important one is asserted in *Knight* v. *Ellis*, 2 Brown Cha. 570; *Ex parte Wynch*, 5 De Gex. McNaughton & Gordon, 129; and in *Emma Myer's Appeal*, 13 Wright, 111. These cases relate, indeed, to verbal construction of wills relative to personalty, but they show that courts are more anxious to support limitations of personal estate than they are of realty The same thing is shown by the greater readiness with which words importing a failure of issue, and introducing a second limitation are construed to refer to a definite failure, when applied to devises of realty It is enough for this case, however, that the second codicil of the will would have given only a life estate to Mrs. Bacon, had the subject of the gift been land. The decreee of the court below was therefore right.

Decree affirmed.

GENERAL CORRESPONDENCE.

Attorney's Act.

To the Editors of the Canada Law Journal.

Mr. Editor,—By Mr. Blake's Bill passed last session in respect of attorney's at law, two additional examinations have been added; but all students who at the date of the passing of the Act are within four years of the expiration of their term are exempt from the first examination.

My Articles are dated the 4th of March, 1867, and the date of the Bill is the 4th of March, 1868. Am I exempt from the first examination or not?

By kindly inserting the above in your journal you will much oblige

Yours truly,

Student.

General Correspondence.

[We cannot undertake to say what view the Benchers may take of our correspondent's case, but we venture to think that he would be so exempt; at the same time we should strongly advise him to get up the books as though the contrary were the case. It can do him no harm, and much good, particularly as under the new regulations the second examination includes a re-examination on subjects and books of first examination.]—Eds. L. J.

Bill Stamps.

To the Editors of the Canada Law Journal.

Gentlemen,—Is a promissory note, draft or Bill of Exchange for an amount less than $25 liable to duty under part 1, Dominion Statutes, 31 Vict. Cap. II. Some of the profession here hold that it is. By inserting this short letter in your next issue and giving your opinion on the subject you will oblige

Yours, &c.,

A Student.

Goderich, June 3rd, 1868.

Our Invaders.

To the Editors of the Law Journal.

Sirs,—You will remember that "*Our Invaders*" has been for a long time past a fruitful topic for correspondents to dwell upon in the columns of "*The Law Times*" nor can there be good cause shewn, I apprehend, why persons in like case offending (and with whom our "New Dominion" is teeming) should not have like attention meted out to them in the columns of "*The Law Journal.*"

I beg to record the fact that there is a Western Town of our Dominion that can boast of a *quartette* of so-called "Lawyers!" Two of these, I am informed, are regularly appointed practising Attorneys! A third, I am told, is a sort of half-taught Law student, who carries on the legitimate business of an Attorney's office under the name of some Attorney or other living many miles away! While a fourth, who has been a student for a little season, sports an office under his own proper name in which cases are received *for or against*, as the case may be, for any of the Courts! Conveyancing attended to in all its branches! proceedings taken under the Power of Sale clause in mortgage! and, in short, every sort and description of Law business done or attempted to be done, just as a lawyer might be expected to do, and for fees such as a lawyer might be expected to charge, merely using the name of *some friendly Attorney* where an Attorney's name cannot be dispensed with. And yet these men call themselves "*Lawyers!*"

This invader pair of our profession are, too, engaged much in speculation of divers sorts (deriving a handsome income therefrom) and by this means may draw much people after them for the exercise of their legal attainments.

Let me ask is not this gross injustice to those who at much expense have fitted themselves for the profession and who naturally turn to it for their stay and support in the great battle of life?

Is not the friendly Attorney guilty of high crimes and misdemeanors for countenancing for a moment so dread an invasion on the sacred rights of brother-practitioners?

If the *Invader* can *not* be reached, may not the *Invader's-for-convenience-sake-Attorney* be reached by the "Law Society" for giving his sanction to a wrong so glaring—to a practice so offensive.

If the gentlemen I refer to have served under Articles for the required time, and have fitness to undergo the usual Examination to qualify themselves for acting a respectable part in the practice of the Law, in the name of all that is honest and fair let them do so first, and no longer seek, to the manifest detriment of those regularly belonging to the profession, to eke out a livlihood by a course so mean, dirty and reprehensible, as *that* that I condemned.

I can only infer that they have not studied long enough; or that they are not fitted to face the examination—*or*, *both!* for, I am advised, they have ample means to pay for a "*certificate*" or *call.*"

Has the Law Society no power to stop this villianous practice on the part of *mere students* of the profession. If it have *not*, the Law should be altered so as to reach them, for I know it is folly to bark, if you can't bite!

Yours, &c.

June, 1868. Sum.

[We shall have occasion to allude to this matter hereafter.]—Eds. L. J.

Insolvent Act—Effect of discharge.

To the Editors of the Law Journal.

There is a subject which I have dwelt on very much in studying the act; it is this:—

The act as to voluntary assignments does not state what effect the discharge shall have, either as regards the person or property; and I have often thought it was intended to enable the insolvent to stop costs, by assigning all he has, and by letting the creditors at their meeting dispose of it, and, if there is no reason for any misconduct, to withhold a discharge, that the judge grants simply a discharge as to that estate and those debts, so far as that property only is concerned, or annexes a condition or suspends it for a time, and that no further actions can be brought or proceeded with to recover either out of the property then assigned or out of other acquired property, but that the other acquired property may be administered either in the Insolvent Court or in Chancery. I see it has been done in England in both Courts. I merely refer to this, and hope to see an article on the subject from the able editors of the *Law Journal*, as no subject is more discussed by the profession in the country than it.

I am, yours truly,

D.

Insolvent Acts—Assignees, &c.

To the Editors of the Canada Law Journal.

Gentlemen,—Your correspondent "Quinte," in the April number of the *Local Courts' Gazette*, addressed to you a long letter in reference to a communication of mine to your paper, on the subject of the conduct of official assignees and the working of the insolvent laws. Other urgent business has prevented me from replying to it, as I conceive it should be answered. "Quiute," from some cause or other, takes umbrage at my remarkes on assignees. Since I wrote my letter, and since his in answer, another correspondent of yours, signing himself "Union," has corroborated my remarks on assignees in your May number of the Journal. I regret to say that I fear all I have said about assignees is too true. I will mention one instance that has lately come to my knowledge. An assignee in the County of York lately undertook to get a young man in the county a discharge under the insolvent laws. Having some acquaintance with the young man, I asked him, from curiosity, what this assignee agreed to do the work for. He says $78! Now, here is an assignee, not a lawyer remember, actually taking a sum larger than even a lawyer would charge, for what? Not certainly for acting for creditors, as the man has no estate, but for drawing papers, notices, attendances before the judge, drawing final order, &c. *Ex uno disce omnes.* I am well aware that assignees have to give security, as "Quinte" says, but I am complaining of the way assignees act. Assignees in too many cases in Canada are merely broken down tradesmen themselves, and people are beginning to think the whole bankrupt law machinery is a humbug. "Quinte" says the present insolvent law of 1864 is not a bungled affair, and he gets rather witty, if not irate, at me for calling it *bungled.* The fact alone, of the necessity of passing an act in 1865 to define the meaning of the act of 1864, is an answer to "Quinte." But taking the two acts together, there are still many doubtful clauses and meanings in them. Some half a dozen cases have arisen already on the construction of certain sections, and there will be dozens more before the acts are understood. What I mean to say is, that the two acts are not plain, are not comprehensive, are not guarded enough. I believe it is quite possible to add greatly to their legal virtues. Some clauses might be left out or consolidated, others should be added. I believe all the suggestions in my former letter right, and particularly mention that relating to personal notice of the final discharge, which I think should be given to each creditor on the application for the final order. I quite agree with many of "Quinte's" cases about the power to remove assignees, and I dare say that the case of *Re Mew* v. *Thorne*, 31 L. J. N. S., is law. We don't disagree about that, but I believe the judge might very well have the power to add conditions to the final discharge. I understand "Quinte" to say that I am wrong in stating that the "*final order*" does not discharge from any debt not included in the insolvent's schedule. He cites several cases to which I will presently refer. Yet at the end of his letter one would think he actually agreed with me on the point. This part of his letter is so *uncertain* that I shall take it that he disputes my position, for he pretends to say that the cases he quotes, "decided that a final order granted under the English acts, similar to our then bankrupt and insolvent acts, could be set up as a defence to any debt *not included in the schedule.*" I will refer to his quoted cases and prove the reverse in a moment. But before

doing so I will draw attention to the wording of our own act. In the beginning of our act (sec. 2) we find it is required that the insolvent shall file and "swear to a schedule containing the names and residences of all his creditors and the amount due to each." In sub-sec. 6 of sec. 2 again we read of this schedule "of all his creditors." Again, sub-sec. 3 of sec. 9 are these words: "The consent in writing, &c., absolutely frees and discharges from all liabilities whatsoever (except what are hereinafter specially excepted) existing against him and proveable against his estate, *which are mentioned and set forth in the statement of his affairs* annexed to the deed of assignment," &c. Now this is the only effect of the final order. Our act thus requires the insolvent to give in all his debts, but if he does not, the penalty is his liability to pay the omitted debts, notwithstanding his final order of discharge.

Then again to return to "Quinte's" assertions against my law. With respect to the question of whether a debt *not included in the insolvent's schedule is barred or not*, I am referred by "Quinte" to several cases. I am more concerned about this part of his letter than any other, for I have ventured an opinion in a former article that my position is correct. Very much to my delight I find that the *very cases* to which I am referred by this learned Belleville gentleman actually support my opinion and disprove his. It is seldom one sees a legal disputant cite authorities to prove his case against himself.

Philips v. *Peckford*, 14 Jurist, 272, is one of his cases, and which is referred to in his next case, *Stephen* v. *Green*, 11 U. C. Q. B. 457. In *Phillips* v. *Pickford* it is held by the court, "that the final order for protection under 5 & 6 Vict. c. 116, as amended by the 7 & 8 Vict. c. 96, is only a bar to actions brought in respect of debts mentioned in the schedule, and to make a plea of such final order a good plea in bar it must allege not only that the debt *accrued before the filing of the petition* but that it was *named* in the *schedule*. In this case, *Jacobs* v. *Hyde*, 2 Exch. 508, is alluded to and distinguished. Now our bankrupt act and old insolvent law, in speaking of the discharge of the insolvent, always alludes to the list of creditors named in his schedule. *Stephens* v. *Green* is against "Quinte," also *Greenwood* v. *Farrell*, 17 U. C. Q. B. 490. This case, however, turned not upon the point in dispute between us, but upon the case of a man giving a note after his petition or assignment in bankruptcy, and before the final order; and it was held that such a debt was not discharged by the final order. The case militates against "Quinte." It is true Mr. Justice Burns says in his judgment, "In bankruptcy the effect of the certificate is to bar not only debts due and owing at the time of the commission issuing, but also all debts proveable under the commission up to the time of granting the final order." But the decisions in England are under acts worded differently from our bankrupt act. The present act is also different from the law in force in 1843 in Canada, and we must always in considering cases look at the words of the act in force. The policy of our act seems to relate to debts named in the filed schedule of creditors. "Quinte" also refers to *Booth* v. *Coldman*, 1 El. & El. Reports, 414. This case does not support his position, nor does it turn on the point in issue between us, but in its spirit is against him. His other case of *Franklin* v. *Beesley*, in 1st El. & El. Reports, is expressly against him, shewing that the debt to be discharged must be included in the schedule. In this last case, *Leonard* v. *Baker*, 15 M. & W., 202, is referred to (and "Quinte" had better see it), which supports my position. His last case in 8 Jurist is also against him. I observe that there has been a case just decided in the Queen's Bench, *McKay et al.* v. *Goodson*, reported in No. 5 of Vol. 27 of the Queen's Bench Reports, in which Mr. Justice Morrison, holds, that to enable an insolvent to ask for a discharge, if arrested for a debt due prior to his assignment in bankruptcy, he must clearly show that the debt was included in his schedule filed with his assignment. His words are, "Upon an application of this nature it is the duty of the applicant to show specifically that the creditor's debt appears on the schedule."

Now I end this article by saying, "Quinte" has attacked my article to very little purpose, and has caused me to look into cases thoroughly confirming me in my view, that "a debt due from an insolvent before his assignment, to be barred, must be included in his schedule, else the liability remains."

I think, moreover, every lawyer in Canada will agree with me in the opinion, that the insolvent laws of Canada require to be read over a great many times before we can get a proper knowledge of the true meaning of them and that it is difficult to understand some clauses at all. I also venture to say that my remarks as to assignees will be assented to, by the legal profession throughout Ontario.

Scarboro'.

Toronto, June 22, 1868.

DIARY FOR JULY.

1. Wed..Dominion Day. Long Vacation begins. Last day for Co. Clerks finally to examine Asst. Rolls, and equalize Rolls Local Municip.
2. Thurs. Error and Appeal Sittings.
5. SUN..4th *Sunday after Trinity.*
6. Mon..County Court and Surrogate Court Term begins. Heir and Devisee sittings commence.
11. Sat. ..County Court and Surrogate Court Term ends.
12. SUN..5th *Sunday after Trinity.*
14. Tues..Last day for County Judges to make return of appeals from assessments.
19. SUN..6th *Sunday after Trinity.*
21. Tues..Heir and Devisee Sittings end.
22. Wed..*St. Mary Magdalene,*
26. SUN..7th *Sunday after Trinity.*

THE

Canada Law Journal.

JULY, 1868.

AMALGAMATION.

By this word we refer to the system which prevails in this country as well as in the United States, as to the union of those two branches of the profession which, in England, are distinct. The articles copied from two English periodicals, and which originated in the remarks of Mr. Justice Hannen, a person, we believe, eminently capable of forming an opinion on such a subject, have drawn our attention to this matter.

The periodicals referred to differ in their views, and one can see both sides of the question, so far as they present them. In this country, where the amalgamation system obtains in full force, we can, from practical experience, form a much better opinion of the advantages and disadvantages of the respective systems than can be gained from mere theory.

As no change is contemplated in this country it is scarcely worth while discussing the subject at any length; but we think that that system which adapts itself to the wants of the people must necessarily be the best, and that strict rules which hamper the conduct of business are to be deprecated as, in general, injurious. The practical result of our system is to make the two branches of the profession distinct in many cases where it is advisable that they should be so distinct; but as this distinction is principally a matter of convenience, and the result of natural causes, it is less likely to be liable to the objections which, in a greater or less degree, arise from the rigid enforcement of rules of professional etiquette, many of which are, undoubtedly, detrimental to the interests of clients, without any corresponding benefit to the profession.

OUR LAWS AND LAWYERS.

We give below some extracts from an interesting lecture on the above subject, lately delivered by Mr. J. C. Hamilton, barrister-at-law. Though intended for the edification of a mixed audience, the essay contained many things which will, we think, be interesting to many of our professional readers. With this in view, we give such extracts as our space permits, thinking that anything light in the way of legal literature is in keeping with the season and the weather. The lecturer thus pleasantly sketches the Court of Chancery; and his remarks are somewhat significant that the writer practices principally in the west wing of Osgoode Hall:

"It is a heavy and encroaching court—a court to be avoided by all sinful men; a court of equity and good conscience, where natural feelings are sacrificed to justice, and 'attachments' are formed and used only as a means of torture. It is a court of numerous officers, many of whom tax costs, some of whom tax our patience. Often attacked, it has still survived, and even grown in bulk and power, and is now an 'indefeasible title' court. Its decrees are not, like judgments at law, unilateral or confined in scope and object, but may—and in practice often do—fearlessly examine all claims to the subject in dispute, and finally settle them.

It protects infants, guards the imbecile and lunatic from rapacity, comes between husband and wife, and has even tender regard to the fairer and frailer portion of the race.

Its judges are our modern knight-errants. They lay bare many a hidden fraud. Airy castles are tumbled down by their injunctions. They unravel many a tangled skein, or cut the Gordian knot of complicated accounts and encumbered estates, and have many an Augean stable to cleanse. Common law judgments are often, in effect, made void, or their operation stayed, by Equity decrees. Some of the general orders materially intrench upon Acts of Parliament.

With this insight into the scope of many suits in Chancery, you may see good reason for their longevity. The solicitor, unlike the attorney, has this happiness—the little bill which he files to-day may become his life-long friend, though it, like Pallas, spring but from his labouring brain,

yet, behold the germ of a long and virtuous existence. It will seek discovery with patient diligence, only equalled by Newton. Then with its charges, which, if not at first full enough, are aided by others in red ink and in blue, and, supported by final replication, it will scold and scrowl like an epistle of Diogenes, with postscript by Zantippe, and, finally, after seeking all manner of aid, it will end by craving such further and other relief as may, by the genius and ability of judges and other officers, be discovered and given—not forgetting costs.

Such, then, is the little mental offspring in its simple dress of black and white, trimmed with blue and fastened with red, which the practitioner with fond hopes may to-day entrust to the Registrar. Nurse it with care past defendants' attacks, nor let it be sacrificed to rude Masters' reports. Though at the first hearing the Chancellor may say cruel things, yet, if on 'further consideration' he speak kindly of your offspring, thereafter all will be happiness—dismissal will be impossible. The only cheques to be received will be from the Registrar for costs; and thus the child of many cares and tender nurture may become the support and companion in declining years, and may, peradventure, provide an heirloom after your own last cause is heard."

After speaking of the different courts and officers he gives us some statistics as to the profession and the Society of which we are members. Thus:—

"The number of barristers in actual practice is about 500, but of attornies, among whom most of this half thousand are included, there are 750. Last term there were twelve barristers called, thirty attornies admitted to practice, and fourteen students entered on the roll. By the *U. C. Law Journal* it appears that in Hilary, Easter and Michaelmas terms of last year, there were thirty-seven calls to the bar and forty-two admissions of attornies.

The Act introduced by Mr. Blake, and passed last session, which imposes additional examination, more reading and less lounging at "terms" will, doubtless, be a boon to the student, and tend to raise the standard.

Each barrister and student has his number in the society's roll; that of the last barrister called is 1,057; that of the last student of the law is 2,062. Remembering that the initiative stage takes generally five years, and making due allowance for the young gentlemen now entering as students and forming part of the above 2,062, and for many whom death may have cut off in their career (and I fear the proportion of those gay and pleasure-seeking fellows so called away is large), there still remains between the number of the latest student and the latest barrister a very large margin. May this not be thus in part accounted for? The ambition which in boyhood fired many an aspirant, who thought it a fine thing to be a lawyer, and 'fagged up' (to use the common term) enough of Horace and Euclid to 'pass Gwynne,' so called because of the important and dread part which that learned gentleman takes in the preliminary examinations, has gradually evaporated as he learned more of the sterner labours and duties before him, or he more exactly weighed and appreciated his mental qualifications, and wisely turned his attention to some of the other many useful and honorable callings always open to the willing and deserving in our happy Province.

Many of those who have actually passed the final stages — been 'called' or 'admitted'— have disappeared from the active ranks, and for like reasons.

The cry so common, as to overstocking of the profession, is probably, however, well founded; especially now that other business is prosperous in a much greater proportion than this. The same remark is often—and probably as justly—made of the medical profession. The evil or, rather, the inconvenience, has its own cure. The supply will lessen, or the surplus—the lighter material—will rise and flow over. Young men, naturally and by circumstances qualified for entering on this profession should not thus be disheartened, but remember the words of Daniel Webster —'Gentlemen, there is plenty of room in the upper stories.'

Having spoken of the professional roll, we may here, perhaps, consider some other facts of interest. The bar of Upper Canada had, it seems, formed themselves into a Society before 1797. In that year, the Statute 37 Geo. III., cap. 13, incorporated themselves under the title of "The Law Society of U. C." This is that "close corporation" of which we hear so much, who, by its benchers, presided over by a chief, called the Treasurer, govern the affairs of the profession. The six senior members of the bar, with the attorney and solicitor-general, and such other members of the bar as they (and the ruling body of the society generally so constituted) thought proper to appoint were, by the above Act, created the first benchers. There were at this time (1797) on the roll fifteen persons, some of whose names are well known in our history, but all of them have long since been enrolled by the sexton. They were John White, attorney-general, Robert Isaac Dey Gray, solicitor-general, Walter Roe, Angus McDonell, James Clark,

Christopher Robinson (father of the late Sir John), Allan McLean, William Dummer Powell, Alex. Stewart, Nicholas Hagarman (father of the late Judge Hagarman), Bartholomew C. Beardley, Timothy Thompson, Jacob Farrand, Samuel Sherwood (brother of the late Judge Sherwood), and John McKay. During the next term, same year, William Weeks was called.

In Easter Term, 1801, James Woods only was called, and in Trinity Term of that year, Thomas Scott. The next was Levius P. Sherwood, afterwards a judge of the Queen's Bench, who was called in Hilary Term, 1803. The number of entrants after this gradually increased. In Easter Term, 1803, eight gentlemen were called. The first six of the original fifteen, with Messrs. White and Gray, the chief law officers of the Crown, at their head, were the first benchers under the Act of 1807. Mr. White was Treasurer the first year, Mr. Gray from 1798 to 1801. After them we find the names of Messrs. Angus McDonell, Thomas Scott, D'Arcy Boulton, whose sons, the Hon. H. J. Boulton and other well-known gentlemen, are still residing in the Province; then Dr. Baldwin Sir John B. Robinson, Hon. H. J. Boulton, Geo. Ridout, Judge Sullivan, V. C. Jamieson, Sir Jas. B. Macaulay, and others, the office being now held by the Hon. J. Hillyard Cameron.

Some of these gentlemen afterwards appear in the list of our chief and other judges, as will be seen by calling their names to memory. The chiefs of the Queen's Bench were Wm. Osgoode, John Elmsley, Henry Alcock, Thos. Scott, Wm. Dummer Powell, Sir Wm. Campbell, Sir J. B. Robinson, Archibald McLean, and Mr. Draper."

We have often thought it a great pity that history should lose any facts or incidents which are interesting, as well in themselves as in relation to the early settlers in this country, or the knowledge of which would tend to throw any light upon scenes now rapidly fading from the memory of even "the oldest inhabitant," and especially so when we remember that, with few exceptions, the men who were of note in the early history of the colony were members of our profession. We are glad, therefore, to see the following notice of two of the gentlemen already referred to:—

Attorney-General John White.—This gentleman's law office was in a log house at the corner of Caroline and Queen streets. He resided afterwards in the house since occupied by the late Samuel Ridout. A dispute which arose between him and another legal gentleman brought them to the so-called field of honor. Pistols were used, and Mr. Attorney's life was the forfeit. This was in January, 1800. Mr. White was appointed Attorney-General, of course, by the Imperial Government. He had a lodge, built of logs and branches, covered with vines, in the woods to the north of his residence, where he used to retire for study and meditation in summer. Here, by his direction, he was buried. His grave was, till lately, visible, though not marked with a tombstone, in the Commons between Seaton and Parliament streets; but an old resident, Mr. John Ross, to whom I am indebted for some of these facts, now living on Adelaide street, informs me that he was unable to find it when passing the locality some few years since.

Solicitor-General Gray.—Several matters of public interest are connected with this gentleman's history which, for lack of records and the failure of memory in the few survivors, are fast falling into oblivion. I have learned the following, after some inquiry: He lived where Dr. Beaumont now resides, on Wellington-street, near York-street. Mr. Gray came from Cornwall, U. C., where his father and mother, as appears from passages in his will, were buried, and he there stated his desire to be buried beside them. Another fate awaited him. A man called Cosens had killed an Indian, whose brother, failing to find Cosens, killed another white man, John Sharpe, a tailor, in true savage revenge. The Indian being apprehended, a court was directed to be held at Presque Isle, near Brighton, for his trial. Judge Cochrane, Sol.-Gen. Gray, Mr. Angus McDonell, Sheriff of York, Mr. Fiske, the high bailiff, the prisoners and others, embarked at this city, then the town of York, in the schooner 'Speedy,' captain Paxton, for the place of trial.

The captain remonstrated with Governor Hunter, as the weather was threatening and the 'Speedy' was unseaworthy, but was over-ruled. A gale came on off Presque Isle, all went down, and were lost. Nor were the bodies of any on board ever afterwards found. The Solicitor-General had premonitions of his end, and stated his fears before embarking. Mr. Gray was a very extensive landholder in the Province. He had also valuable interests in a species of chattel property, for some time, fortunately, unknown among us. By the will already referred to, dated August 27, 1803, and made shortly before his death, he 'manumits and discharges from the state of slavery in which she now is, his faithful black woman servant Dorinda and gave her and her children their freedom; and, that they might not want, directed that £1,200 should be invested and the interest applied to their maintenance. To his black servants Simon and John Baker he gave, beside their freedom, 200 acres of land each and pecuni-

ary legacies. Descendants of the faithful Dorinda are still living in or near Cornwall, at very advanced ages, as well as the above-mentioned John, now said to be over ninety years old. It will be remembered that, though the slave trade was prohibited by the Provincial Act 33 Geo. 3, cap. 7, yet the state of involuntary servitude in Upper Canada was not abolished till afterwards.

It is remarkable that the Government had two schooners built at Kingston in Gen. Hunter's time, called, usually, 'the King's vessels.' The other sailed with a number of soldiers on board, and had the same fate as the 'Speedy,' neither ship nor passengers being afterwards seen."

JUDGMENTS.

QUEEN'S BENCH.

Present—The Hon Mr. Justice Hagarty; the Hon. Mr. Justice Morrison.

Wednesday, June 17, 1868.

Yorkville Road Co. v. *Baldwin* —Judgment for defendant.

Great Western Railway Co. v. *Pluman.*—Rule refused.

Hall v. *McCollum.*—Rule nisi granted.

Kerr v. *McEwan.*—Application to extend time for appeal refused.

Gould v. *British America Ins. Co.* — Rule discharged. Judgment for plaintiff on demurrer.

Commercial Bank v. *Harris.* — New trial on payment of costs by plaintiffs.

Nicholson v. *Page.*—Rule discharged.

Corporation of Huron v. *Armstrong.* — Judgment for plaintiffs on demurrer. Rule absolute.

Re Totten.—Rule absolute without costs.

Gilchrist v. *Ramsay.*—Rule discharged.

Corporation of Chatham v. *Houston.*—New trial without costs.

Cain v. *Lancashire Ins. Co.* — New trial without costs.

Henderson v. *Vermilyea.*—Rule discharged.

Henricks v. *Henricks.*—Rule absolute.

Maybee v. *Turley.*—Rule discharged.

Bobier v. *Clay* —Rule absolute for nonsuit.

Leslie v. *Long.*—Cross rules. Both rules discharged with costs.

Re Appelbee & Baker;—Rule absolute.

Grigs v. *Billington.*—Rule discharged.

Wells v. *Cummings.*—Rule discharged.

Ladyard v. *Drain.*—Rule discharged.

The Queen v. *Sinnott.*—Rule discharged

Healey v. *Parker.*—Rule discharged.

Simpson v. *Hartman.*—Rule discharged.

COMMON PLEAS.

Present — The Hon. The Chief Justice; the Hon. Mr. Justice Adam Wilson.

June 22, 1868.

Cotter v. *Sutherland.*—Rule absolute to enter verdict for plaintiff. Leave to appeal granted.

Stevens v. *Jacques.*—Rule discharged. Leave to appeal granted.

Scatcherd v. *Stewart* —Rule discharged.

Smith v. *Shewan.*—Rule discharged.

Bell v *McLean.*—Rule discharged.

Ruthven Woollen Manufacturing Co. v. *Great Western Railway Co.*—Rule discharged.

Ewing v *Deadman* —Rule discharged.

Bank Upper Canada v. *Mercer.*—Judgment for plaintiff on demurrer.

Young v. *Crossland* —Judgment for defendant on demurrer, with leave to amend on payment of costs in three weeks.

Dunlop v. *Burnham.*—Stands.

Harkley v. *Provincial Insurance Co.*—Rule absolute for new trial without costs.

Strickland v. *Vansittart.*—Rule discharged.

Lalor v. *Burrow.*—Rule discharged.

McCabe v. *Robinson.*—Rule absolute for new trial. Costs to abide event.

Fenton v. *Kay.*—Rule discharged.

Burleigh et al. v. *Campbell.*—Rule absolute to enter nonsuit.

Crandell v. *McLaughlin et al.* — Rule discharged.

Roe v *Bank British North America.* — Rule absolute to enter nonsuit.

Hayman v. *Heward.*—Appeal allowed without costs, and rule *nisi* in court below for new trial discharged with costs.

June 27, 1868.

Coons v. *Etna Insurance Company* —New trial upon payment of costs by plaintiff within a calendar month, otherwise rule absolute for nonsuit.

Hope v. *White.*—Rule absolute for non-suit. Leave to appeal granted.

Dove v. *Dove.*—Rule discharged. Leave to appeal refused.

Brown v. *McCarty et al.*—Judgment for plaintiff.

Re Moore v. *Luce.*—Appeal disallowed without costs, or with costs of appeal and costs in court below against the estate, if proceedings stand, and the court below directed to allow appellant further to be heard on his petition.

McLean v. *Eccleston.*—Appeal dismissed without costs.

McHugh v. *Grear.*—Judgment for defendant.

Davis v. *Stewart et al.*—Judgment for plaintiff on demurer to replication.

Kinghorne v. *British America Insurance Co.*—On defendants paying $200 into court within a month, rule discharged with costs; if not paid, then court will consider case next term.

Crawford v. *Great Western Railway Company.*—(Plaintiff's rule). Rule *nisi* discharged.

Same v. *Same.*—(Defendants' rule). Rule absolute to enter verdict for defendant on 1st, 2nd and 3rd issues, and verdict for plaintiff on 4th issue to stand, and verdict for plaintiff on 5th issue.

Buchanan v. *Cunningham.*—Rule discharged.

Eakins v. *Christopher et al.*—Judgment for plaintiff on demurer.

In re Burrowes.—Rule discharged with costs, to be paid Mallory.

Dunlop v. *Burnham.*—No judgment; notice of setting down having been set aside.

Purtell v. *Buchan.*—To be re-argued.

Ball v. *Town of Niagara.*—No judgment. Case in course of settlement.

We subjoin a table, compiled by an official in one of the courts, which will be of much use to those concerned in the transaction of business in the Courts of Queen's Bench and Common Pleas, during

EASTER AND MICHAELMAS TERMS.

Days.	First Week.	Second Week.	Third Week.
Monday	Motion Rule Nisi in Q. B. or C. P.	Paper Day, Q. B. New Trial Day, C. P.	Paper Day, Q. B. New Trial Day, C. P.
Tuesday	ditto	New Trial Day, Q.B. Paper Day, C. P.	New Trial Day, Q.B. Paper Day, C. P.
Wednesday..	ditto	Paper Day, Q. B. New Trial Day, C. P.	Open Day, Q.B. New Trial Day, C. P.
Thursday	ditto	Open Day, Q.B. Paper Day, C. P.	Open Day, Q.B. Open Day, C. P.
Friday.....	Paper Day, Q. B. New Trial Day, C. P.	New Trial Day, Q.B. Open Day, C. P.	New Trial Day, Q.B. Open Day, C. P.
Saturday....	New Trial Day, Q.B. Paper Day, C. P.	Open Day, Q.B. Open Day, C. P.	Open Day, Q.B. Open Day, C. P.

Hilary Term lasts only two weeks, and business is disposed of during these two weeks in the same manner as during the first two weeks of the other Terms.

County Court appeals must be set down for the first or second Paper Days of each Term, after the date of the Appeal Bond; and on those days are placed first on the paper.

SELECTIONS.

SUNDAY LAWS.*

Among theologians, in their ever recurring discussions upon the so called Sunday questions, two leading points of controversy have arisen,—the one as to the origin of the appointment of the first day of the week for peculiar observance; the other, as to what the nature of such observance should be. In regard to the first, the law has taken no heed: it found the first day of the week already selected for observance, which observance was enforced by legislation; but, as to the second, we find an almost infinite variety of provisions, shaped, it would seem, to meet the popular feeling and mode of life of the people by whom they were made, and changed from time to time according as that feeling and mode of life changed. Indeed, a study of the Sunday laws of the different portions of the United States, it is thought, would furnish, in a measure, some indication of the peculiar characteristics of its people. Thus we are not surprised that the strong religious feeling of Massachusetts compelled, by its early legislation (1791), the attendance at some church of every able bodied person, under the penalty of a fine; while its regard for freedom of religious thought is shown by the proviso, that such attendance was not required where there was no place of worship at which such person could conscientiously attend.

A similar compulsory attendance was required by an earlier statute of Connecticut (1751), which contains the following stringent provision: "No persons shall convene or meet together in company in the streets, nor go from his or her place of abode, on the Lord's day, unless to attend upon the public worship of God or some work of necessity or charity." This is followed by the provision, that "no person convicted of any offence under this act shall be allowed any appeal." So in Georgia

* This article will be read with interest in view of a recent high-handed proceeding of a Toronto policeman, who entered the room of a stranger in the city, on a Sunday, without any warrant, and took him into custody and confined him all night in a filthy cell, because he heard him playing some simple airs on a violin at the back window of his lodgings on Sunday. The unconscious victim was heavily fined and admonished by the Police Magistrate the next day. The extraordinary conduct of this ardent protector of the public morals was fully discussed by the public press, and probably will not occur again for some time. It was suggested at the time that the musical talent of Toronto policemen must be of a high order when an otherwise uneducated "Bobby" could at once discern the exact line where sacred music ends and secular music begins.—[Eds. L. J.]

and South Carolina, an early statute compelled attendance at church. The effect of slavery shows itself in the Sunday laws of some of the States. Thus, in Virginia, *any free person* found laboring at any trade or calling on Sunday was liable to a fine; while in Texas the only provision which forbids laboring on Sunday is one which fines any person who shall compel *his or her slaves, children, or apprentices to labor*, except in the sugar-making season and to save a crop, on that day.

In Florida, it is provided that "no person shall employ his apprentice, servant, or slave in labor, and that no merchant shall keep open his shop," on Sunday; and this seems to be the only restriction upon labor in this State on that day. The same statute exists in Alabama, with a provision that contracts made on Sunday are void.

In Ohio and Illinois, the Sunday laws, which are as stringent as in most States, have been made to yield to the throng of emigration which sweeps over them, by a provision that nothing shall prevent emigrants moving forward on Sunday, and that ferrymen, tollgate-keepers, and the like, shall be allowed to labor on that day in their behalf.

A tolerance toward those who believe that the seventh day of the week, instead of the first, should be set aside for observance, is shown in some of the States by making such persons exempt from the provisions of the Sunday law. This is so in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Ohio, Indiana, Illinois, Arkansas, Michigan, Kentucky, and Wisconsin. In all the above mentioned States the exception is general, save in Rhode Island, New York, and New Jersey. In Rhode Island, after providing that "all professors of sabbatarian faith or of the Jewish religion" shall be permitted to work on Sunday, the statute denies them the liberty of opening shops for the purpose of trade, or of lading or unlading vessels, or of working at the smith's business or at any other mechanical trade, in any compact village, except the compact villages of Westerly and Hopkinton. In New York and New Jersey there seems to be a qualified exemption for Jews and other sabbatarians, by a provision which excuses them from jury and other public duties on Saturday, and from answering process on that day.

Either from inadvertance or a want of the liberality shown in the other States, the Sunday laws of Pennsylvania, New Hampshire, Delaware, Maryland, North Carolina, South Carolina, Georgia, Tennessee, Mississippi, Alabama, Florida, and California are silent in regard to this by no means inconsiderable class; and it has been held in the first mentioned State that the provisions of the Sunday laws apply to Jews as well as others. *Commonwealth* v. *Wolf*, 3 S. & R. 48; *Society &c.*, v. *Commonwealth*, 52 Penn. St. 125; *City Council* v. *Benjamin*, 5 Strobh. 508; but see *Ex parte Newman*, 9 Cal. 502.

Thus far reference has been had chiefly to the provisions of the statutes of the different States in regard to the observance of Sunday, which serve to illustrate the spirit or characteristics of the State where they are found,—an investigation perhaps more curious than valuable. The most important differences, in a legal point of view, are those which are found in comparing the clauses in the statutes of the different States which restrict business, labor, and pleasure on the first day of the week.

In *Swann* v. *Broome*, 1 W. Bl. 526, Lord Mansfield gives the history of the common law doctrine, "Dies Dominicus non est juridicus," and declares that no judicial act could be done on Sunday. Other than this, the common law makes no distinction between it and any other day. The case of *Hiller* v. *English*, 4 Strobh. 486, contains an exhaustive discussion upon the limitation placed on judicial acts upon Sunday.

Laws upon the observance of Sunday came naturally from the Church at an early day; but it was not until after six hundred years that labor and secular business were prohibited by it, and then only so far as they are an impediment to religious duties, and because of their being so.

The earliest important civil legislation (5 & 6 Ed. V. c. 3) looks only to the religious celebration of the day, "that it be kept holy," and in no manner forbids labor. The statute 1 Eliz. c. 2, and 8 Jac. I. c. 4, § 27, in the same spirit, punishes by fine "all persons having no lawful or reasonable excuse for absence from church," but puts no further restriction on the observance of Sunday.

We are obliged to wait until the statute of 29 Car. II. c. 7, § 1, before we find any restriction, in terms, upon labor on the first day of the week. Up to this time, the laws had been but a re-enactment of the first clause of the Mosaic law known as the Fourth Commandment, "Remember the sabbath day to keep it holy." This statute seems to be the interpretation in that age of the remainder of that Commandment; viz., "Six days shalt thou labor, and do all thy work," &c. From this statute (29 Car. II. c 7, § 1) spring, with many modifications, the Sunday laws, as they are now found in this country.

In some of the States, as we have seen, the statute of Elizabeth compelling attendance at church has been followed (though all such laws are now, it is believed, repealed); but, for the most part, sufficient, and many of these follow closely upon the English statute of Charles II. in their terms. By this statute, no tradesman, artificer, workman, laborer, or other person or persons whatever, *shall do or exercise any worldly labor or business, or work of their ordinary calling, on Sunday*; and it prohibits the sale or hawking of goods and wares.

This statute is followed, in terms, in Georgia and South Carolina, and nearly so in Tennessee; so that, in these States, the rule laid down by Lord Tenterden, in *Sandiman* v. *Breach*, 7 B & C. 96, would apply: that under the words "person or persons" no other class is included than those described by the words which precede them. This would seem to be the case in North Carolina, where the terms of the statute are "no tradesman or other person."

The clause in the statute of Charles II. which forbids "any labor, business, or work of ordinary calling" on Sunday, is to be found in many of the statutes in this country, and has received an interpretation in the different courts of many of the States. In the case of *Allen* v. *Gardiner*, 7 R. I. 22, it was held that the execution of a release by a creditor to an assignee on Sunday is not a work of ordinary calling.

In a recent case in Massachusetts, not yet reported (*Hazard* v. *Day*), the Court refused to disturb the finding of the Court below,—that a real estate broker in Rhode Island, who delivered on Sunday a contract of his principal and received from the defendant a duplicate contract and check signed by him, was acting in his ordinary calling, and was within the Sunday law of that State. In Georgia, the execution and delivery of a note is held not to be within a person's ordinary calling. *Sanders* v. *Johnson*, 29 Ga. 526. And in North Carolina, where the sale of a horse was made privately on Sunday by a horse dealer to a person who was aware of the vendor's ordinary business, it was held that an action on the warranty would lie: *Melvin* v. *Easley*, 7 Jones Law, 356. The leading English cases bearing on the question as to what constitutes ordinary calling, are *Drury* v. *Defontaine*, 1 Taunt. 131; *Scarfe* v. *Morgan*, 4 M. & W. 270; *Wolton* v. *Gavin*, 16 Q. B. 48; *Fennell* v. *Ridler*, 5 B. & C. 406; *Norton* v. *Powell*, 4 M. & G. 42; *Smith* v. *Sparrow*, 4 Bing. 84; *Blocksome* v. *Williams*, 3 B. & C. 232; *Rex* v. *Whitnash*, 7 B. & C. 596; *Begbie* v. *Levi*, 1 Cromp. & J 180.

In most of the States,—viz., Maine, Massachusetts, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Kentucky, Mississippi, Arkansas, Michigan, and Wisconsin,—it is evident, from the terms of the Statute, that it was the intention of the legislature to compel a general suspension of business and labor on Sunday.

Thus the execution of any contract on Sunday renders it void, as in the case of a promissory note made and delivered on that day. *Hilton* v. *Houghton*, 35 Me. 143; *Towle* v. *Larrabee*, 26 Me. 391; *State* v. *Suhur*, 33 Me. 539; *Nason* v. *Dinsmore*, 34 Me. 391; *State Bank* v. *Thompson*, 42 N.H. 369; *Allen* v. *Deming*, 14 N.H. 133; *Lyon* v. *Strong*, 6 Vt. 219; *Lovejoy* v. *Whipple*, 18 Vt. 379; *Adams* v. *Gay*, 19 Vt. 358; *Wight* v. *Geer*, 1 Root, 474; *Kepner* v. *Keefer*, 6 Watts, 231; *Hill* v. *Sherwood*, 3 Wis. 343. In *Kaufman* v. *Hamm*, 30 Mo. 387, a note given on Sunday for an antecedent debt was held valid. A bond given on Sunday has been held void. *Pattee* v. *Greely*, 13 Met. 284; *Fox* v. *Mensch*, 3 Watts & Serg. 444; see also *Commonwealth* v. *Kendig*, 2 Penn. St. 448.

So "swopping horses" on Sunday is illegal and void, as is any warranty given at the time. *Lyon* v. *Strong*, 6 Vt. 219; *Robeson* v. *French*, 12 Met. 24; *Murphy* v. *Simpson*, 14 B. Mon. 419; but see *Adams* v. *Gay*, 19 Vt. 358. A sale made on Sunday of a horse is void. *O'Donnell* v. *Sweeney*, 5 Ala. 467; *Adams* v. *Hamill*, 2 Douglass, 73; *Hulet* v. *Stratton*, 5 Cush. 539; *Northrup* v. *Foot*, 14 Wend. 248; but *Miller* v. *Roessler*, 4 E. D. Smith, 234. An action of contract will not lie for a horse sold on Sunday, although the purchaser keep him afterwards. Trover is the form of action. *Ladd* v. *Rogers*, 11 Allen, 209.

But a subsequent ratification of a contract made on Sunday makes it valid. *Sargeant* v. *Butts*, 21 Vt. 99; *Sumner* v. *Jones*, 24 Vt. 317; *Johnson* v. *Willis*, 7 Gray, 164; see also *Smith* v. *Bean*, 15 N.H. 577; *Clough* v. *Davis*, 9 N.H. 500.

A sale and delivery of property on Sunday, though contrary to law, cannot be rescinded by either party. *Moore* v. *Kendall*, 1 Chand 33.

A guaranty for the fulfilment of a lease executed on Sunday is void, although the lease is not executed until a week day following. *Merriam* v. *Stearns*, 10 Cush. 257.

Where a letter is written and delivered on Sunday promising pay for the performance of services, and there is no proof of agreement to perform the same, action may lie thereon for week day services. *Tuckerman* v. *Hinckley*, 9 Allen, 452. It is not sufficient to avoid a Sunday contract, that it was entered into then: it must be consummated on that day. *Adams* v. *Gay*, 19 Vt. 358; *Sumner* v *Jones*, 24 Vt. 317. So where A. on Sunday proposed to B. to work for him, and B. on Monday, with others, took the subject into consideration, and went to work on Tuesday, it was held that B. could recover for services. *Stackpole* v. *Symonds*, 3 Foster, 229. As has been stated, a contract made in Alabama on Sunday is, by the terms of the statute, void.

A number of acts performed on Sunday have been held to be lawful. Thus a contract made and executed on that day is valid to pass title. *Greene* v. *Godfrey*, 44 Me 25. See *Merritt* v. *Earle*, 31 Barb. 38. So where a steamboat company on Sunday landed and stored in a railroad company's warehouse goods which were afterwards consumed by fire, they having been sued and obliged to pay for the goods, it was held that they were not prevented by the Sunday laws of Virginia from recovering in a suit against the railroad company. *Powhatan Steamboat Co.* v. *Appotamox R. R. Co.*, 24 How. 247. See *Slade* v. *Arnold*, 14 B. Mon. 287.

In Massachusetts, a will executed on Sunday is valid. *Bennett* v. *Brooks*, 9 Allen, 118. So in New Hampshire. *Perkins* v. *George*, 1 Am. Law Rev. 755.

A question has often arisen, whether a contract was made in point of time, so as to bring it within the Sunday laws. Thus it has been held that where a proposition was made on Saturday and completed by a delivery on Sunday, the contract was made on Sunday. *Smith* v. *Foster*, 41 N.H. 215. So where an agreement for use and occupation of land was made on Sunday, it was held void; but, if entered on and occupied, an action will lie for use and occupation. *Stebbins* v. *Peck*, 8 Gray, 553. A note executed on Sunday but delivered on some other day, has been held valid. *Lovejoy* v. *Whipple*, 18 Vt. 379; *Goss* v. *Whitney*, 24 Vt. 187; s. c. 27 Vt. 272; *Hilton* v. *Houghton*, 35 Me. 143; *Bank of Cumberland* v. *Mayberry*, 48 Me. 198. See *Ray* v. *Catlett*, 12 B. Mon. 532; *Clough* v. *Davis*, 9 N. H. 500; *Sherman* v. *Roberts*, 1 Grant's Cases, 261.

In Massachusetts, if the charges on a party's day book, on which he relies as evidence of his claim, are dated on the Lord's day, he must show that the sale was not in fact made on that day, or he cannot recover. *Bustin* v. *Rogers*, 11 Cush. 346. But the Court will draw no inference from the date of the contract, on a motion in arrest of judgment. *Hill* v. *Dunham*, 7 Gray, 543.

The case of *Adams* v. *Gay*, 19 Vt. 358, is very instructive in showing the effect of Sunday laws generally upon contracts.

The legislation of New York differs from that of any other State. It provides that there shall be no servile labor or work on that day, but allows the sale of meats, milk, and fish before nine o'clock in the morning. Under this statute, it has been decided that any business but judicial may be done on Sunday. *Boynton* v *Page*, 13 Wend. 425; *Miller* v. *Roessler*, 4 E. D. Smith, 234; *Sayles* v. *Smith*, 12 Wend. 57; *Greenbury* v. *Wilkins*, 9 Abbott's Practice R. 206; *Batford* v. *Every*, 44 Barb. 618.

In the case of *Smith* v. *Wilcox*, 25 Barb. 341, s. c 24 N.Y. 353, the distinction between business and servile labor is pointed out. There it was held, that no action would lie for advertising in a Sunday paper; but an agreement made on Sunday to publish an advertisement on a week day is valid. Work by an attorney's clerk on Sunday has been held to be servile labor, for which no compensation could be had as extra services, *Watts* v. *Van Ness*, 1 Hill 76; but a contract to transport property is not void because the transportation commences on that day. *Merritt* v. *Earle*, 31 Barb. 38.

In Ohio and Indiana, by the terms of the statute, "common labor" is forbidden on Sunday. This phrase has received a different construction in the two States. Thus in Ohio a contract made on Sunday is held valid. *Bloom* v. *Richards*, 2 Ohio St. 387; *McGatrick* v. *Wason*, 4 Ohio St. 566; *Brown* v. *Timmany*, 20 Ohio, 81; *Swisher* v. *Williams*, Wright, 754. But a merchant may not sell wares on that day. *Cincinnati* v. *Rice*, 15 Ohio, 225. In *Bloom* v. *Richards*, the Court remarked: "The statute prohibiting common labor on the Sabbath could not stand for a moment as the law of this State, if its sole foundation was the Christian duty of keeping the day holy, and its sole motive was to enforce the observance of that day. It is to be regarded as a mere municipal regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day.

In Indiana, on the other hand, a contract made on Sunday is void, as a note or bond. *Reynolds* v. *Stevenson*, 4 Ind. 619; *Link* v. *Clemmens*, 7 Black. 479; *Bosley* v. *McAllister*, 13 Ind. 565. Subsequent ratification, however, makes it good. *Banks* v. *Werts*, 13 Ind. 208. In the same State it has been solemnly held that "gambling is not an act of common labor or usual avocation" *State* v. *Conger*, 14 Ind. 396; the accuracy of which, some who have travelled upon the rivers of the West might doubt.

The statute of Tennessee much resembles those of Ohio and Indiana. By its terms, "the practice" of the common avocations of life on Sunday is forbidden.

The statutes of Illinois and New Hampshire seem to be, upon their face, most liberal. By the terms of the first, no use of the Sabbath is forbidden, except that which "disturbs the peace and good order of society;" and in New Hampshire such ordinary business or labor is forbidden only as is carried on "to the disturbance of others." The interpretation in the last State, by the Courts of what constitutes a legal "disturbance of other," narrows to a great extent this seeming liberality. In *Varney* v. *French*, 19 N.H. 233. a contract for the sale of a horse was made on Sunday, and a note given. This was done at the house of the plaintiff, whose wife was present in the room reading a paper. The Court held that the note was void, the giving of it being, under the circumstances, a disturbance of others under the Statute; and that an act is none the less within the statute although other persons present may not object to its performance. *Allen* v. *Deming*, 14 N.H. 133; *Clough* v. *Shepherd*, 11 Foster, 490; *Smith* v. *Foster*, 41 N. H. 215. But such a contract may be subsequently ratified. *Smith* v. *Bean*, 15 N. H. 577; *Clough* v. *Davis*, 9 N. H. 500. As to what constitutes a Sunday contract, see *Smith* v. *Foster*, 41 N.H. 215.

In Pennsylvania, wordly "employment or business" is forbidden on Sunday. Under this act, contracts have been held to fall, as a bond or note. *Kepner* v *Keefer*, 6 Watts, 231; *Fox* v. *Menech*, 3 W. & S. 441; *Heydock*

v. *Tracy*, 3 W. & S. 507; *Morgan* v. *Richards*, 1 Browne, 171. In this State, the question has been raised, whether a marriage entered into on Sunday was valid, and it was so held; but, upon the question of the validity of the marriage settlement made on that day, the Court were divided. *Gangwere's Estate*, 14 Penn. St. 417.

Where a party has set up a claim for damages, the question has arisen whether the fact that he was, by the Sunday law unlawfully engaged, was a good defence. This has been held to so in Massachusetts. *Bosworth* v. *Swansey*, 10 Met. 363; *Jones* v. *Andover*, 10 Allen, 18; *Stanton* v. *Metropolitan, R. R Co.* (not yet reported). But in *Etchberry* v. *Levielle*, 2 Hilton, 40, it was held no defence to a suit for damages arising from a tort inflicted during a game, that such game was unlawful. See also *Mohney* v. *Cook*, 26 Penn. St. 342, and *Philadelphia R R. Co.* v. *Tow Boat Co.* 23 Howard, 209, where damage was done to a vessel sailing on Sunday.

With the large number of foreigners found in some of our States, it is not remarkable that the Courts have been called upon to settle whether the legislature can, by such enact ments as Sunday laws, restrict them in the use of their property, limiting its value, and calling upon them for an observance of Sunday in a manner so different from that to which they have been accustomed in their own country. Thus in New York, in *Lindenmuller* v. *People*, 33 Barb 548, it was claimed that the law forbidding the opening of theatres on Sunday is a "deprivation of the citizen of his property," under the Constitution; but the Court, in an opinion of great length, refuse to sustain this position.

In *Ex parte Andrews*, 18 Cal. 678, the provision prohibiting all persons from opening their places of business on Sunday, was held to be not unconstitutional. This was affirmed in *Ex parte Bird*, 19 Cal 130.

For acts of charity and necessity there is a universal exception from the effect of the Sunday laws; but what shall be so held has given rise to a diversity of decisions. The legal definition of a work of necessity is well stated in *Flagg* v. *Millbury*, 4 Cush. 243, where the Court say that a physical and absolute necessity is not wanted; "but any labor, business, or work which is morally fit and proper to be done on that day, under the circumstances of the particular case, is a work of necessity within the statute." So that the repairs of a road, which should be made immediately, is a work of necessity; and the fact that it would have to be done on Sunday is no defence in an action for damages arising from a defect in an action for damages arising from a defect in the highway. So if property is exposed to an imminent danger, it is not unlawful to preserve it and remove it to a place of safety on Sunday; as where a plaintiff agreed to collect logs scattered by a storm, and defendant agreed to take them away on the next day, which should be a Sunday, Tuesday, or Friday, the contract was held to be binding. *Parmalee* v. *Wilks*, 22 Barb, 539. So labor on merchandise which A. has agreed to ship, and where longer delay is dangerous on account of the closing of navigation, is within the exception. *McGatrick* v. *Wason*, 4 Ohio St. 566.

In Alabama, a contract made on Sunday, to save a debt or avoid a threatened loss, has been held valid. *Hooper* v. *Edwards*, 18 Ala. 290; s. c. 25 Ala. 528. The hire of a horse and carriage on Sunday by a son to visit his father in the country, was held to be a valid contract. *Logan* v. *Mathews*, 6 Penn St. 417. In Massachusetts, where travelling on Sunday is prohibited, in *Buffinton* v. *Swansey* (an unreported case, tried in Bristol County, November Term, 1845), the facts showed that a young man, who worked at a distance during the week, received injuries arising from a defect in the highway, while proceeding to visit his betrothed on Sunday, and the point was raised, and discussed by the court, whether such visit might not be an act of necessity or charity. The question, however, never reached the full Court.

The letting of a carriage for hire on Sunday from a belief that it was to be used in a case of necessity or charity, when it was not in fact so used, has been held not to be an offence under the statute. *Meyers* v. *The State*, 1 Conn. 502. The supplying of fresh meat on Sunday is not a necessity in Massachusetts. *Jones* v. *Andover*, 10 Allen, 18. The case of *State* v. *Goff*, 20 Ark. 289, if the facts are correctly reported, would seem to be one of too great strictness of interpretation. Defendant was poor; had no implements to cut his wheat, which was wasting from over-ripeness; and he could borrow none until Saturday evening. He exchanged work with his neighbors during the week, hired a negro, and cut his own wheat on Sunday. Held no justification for breaking the Sabbath.

In 1618, James the First of England issued his famous "Book of Sports," in which are set out the sports which "may be lawfully used on Sunday." This was in consequence of the complaints of the arbitrary interference of Puritan magistrates and ministers; and it is therein provided that "the people should not, after the end of divine service, be disturbed, letted or discouraged from any lawful recreation." The Statute of Car. I, c. 1, which prohibits sports on Sunday, did away with the effect of the "Book of Sports;" and and a similar law is to be found in most of the States.

Travelling upon the Sunday is especially forbidden in some of the States; viz, Massachusetts, Vermont, Connecticut and New York. Under these statutes, it has been held that where a horse has been let to go a certain distance on Sunday, and is driven further, and so injured, no action will lie for such injury. *Gregg* v. *Wyman*, 4 Cush. 322. So where a horse was injured by fast driving on Sunday.

Way v. *Foster*, 1 Allen, 408. In Maine, it is held that no action lies for the death of a horse by fast driving on Sunday, but that trover for conversion will. *Morton* v. *Gloster*, 46 Me. 520. See *Woodman* v. *Hubbard*, 5 Foster, 67

In *Bryant* v. *Brideford*, 39 Me. 198, a horse was let on Sunday, and an injury occurred after the legal expiration of the day. The town was held liable for an injury arising for want of repair of the road.

In Massachusetts, the Courts have been recently called upon to give an interpretation to the word "travelling," in two recent cases which are not yet reported. In *Hamilton* v. *The City of Boston*, the plaintiff received an injury on Sunday from a defect in the highway. The Court held that walking half a mile in the streets of Boston on Sunday evening, with no intention of going to or stopping at any place but the plaintiff's own house, was not travelling within the meaning of the Lord's Day Act; but in *Stanton* v *Metropolitan R. R. Co.*, where plaintiff received an injury by being thrown from one of the defendants' horse cars, while on the way to visit a friend, it was held that the plaintiff was travelling in violation of the Lord's Day Act. In England, where the Sunday law forbids the selling of ale or spirit to any but travellers on Sunday, it is held that "a man who goes a short distance from home, for the purpose of taking refreshment, is not a traveller." *Taylor* v. *Humphreys*, 10 C. B. (N.S.) 429.

The carrying of the United States mail on Sunday awakened a discussion, which became important in a political point of view, about the year 1830, and was made the subject of party issues. (See the Report of Hon. R. M. Johnson, of the Committee of the United States House of Representatives, which shows how serious a consideration was given to the question.) Before this, in Massachusetts, it had been held that one carrying the mails on Sunday could not be arrested, but not so his passengers, "nor may he blow his horn to the disturbance of serious people." *Commonwealth* v. *Knox*, 6 Mass 76. Although the mails were allowed to travel on Sunday in Massachusetts, it was not so with the Chief Justice of the State and his associates. An indictment was filed against them in 1793 for travelling on Sunday, and they found it necessary to humbly petition the Legislature to authorize a *nolle prosequi*.

In Rhode Island, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Kentucky, Indiana, Mississippi, Illinois, Alabama, Missouri, Arkansas, Wisconsin, Texas, Michigan, and Florida, travelling is not forbidden on Sunday.

In Pennsylvania, it has been held that the statute does not forbid travelling. *Jones* v. *Hughes*, 5 S & R. 299. But it does not allow an omnibus or horse car to be driven on that day, it being held a worldly employment and breach of the peace. *Johnston* v. *Commonwealth*, 22 Penn. St. 102. This has been recently overruled in *Sparhawk* v. *Union Passenger R. R. Co.*, not yet reported. So the hire of a horse for a pleasure excursion on Sunday cannot be recovered. *Berrill* v. *Smith*, 2 Miles, 402.

By the Delaware statute, carriers, pedlers, and stage drivers are forbidden from driving or travelling on Sunday. The Ohio statute provides that emigrants are not affected by its terms; and that of Tennessee, that nothing in the statute shall prevent travellers or persons moving with their families.

What effect a contract made on Sunday, and so void, has upon the rights of third parties, has been considered by the courts. Thus a note made and delivered on Sunday, though illegal, if indorsed before maturity, without notice of any defect, to a *bona fide* holder, cannot be impeached in his hands. *State Bank* v. *Thompson*, 42 N. H. 369; *Bank of Cumberland* v. *Mayberry*, 48 Me. 198; *Allen* v. *Dening*, 14 N. H. 133. A deed on Sunday cannot be avoided by a stranger to the transaction claiming by a subsequent levy. *Greene* v. *Godfrey*, 44 Me. 25; *Richardson* v. *Kimball*, 28 Me. 463. See *Saltmarsh* v. *Tuthill*, 13 Ala. 390.

An extended examination of the Sunday laws, with their differing terms, and of the various and conflicting decisions under them, suggests the inquiry as to what legislation is best fitted to accomplish that which every good citizen desires — a proper observance of Sunday. A thorough discussion of this question opens the door to the arguments which have been offered on both sides in such numbers upon the propriety of setting apart any day of the week, especially as a day of worship; it being contended by some that all days should, in their religious observance, be alike. Persons holding these views agree, however, that there is a necessity, in the physical nature of man, for occasional rest, and that therefore a cessation from work at fixed intervals is proper. In support of this position, they cite the meaning of the Hebrew word rendered "Sabbath," which is *rest*; and claim that the only thing commanded by the Scripture is *rest;* that the space of six days seems to be the natural limit of successive labor without physical injury; and that therefore, as a mere regulation for the preservation of the public health, there should be a law forbidding labor on each seventh day. See 2 Ohio St. 387. The result of the decree of the National Convention of France, 3 Brumaire, An 2 (Oct. 24, 1793), whereby the *decade* or period of ten days, of which the tenth was appointed as a day of suspension of labor, was substituted for the week, is also cited. After a period of twelve years, the old division of time was restored by Napoleon—one day in ten having been found to give insufficient rest. The translation of the Hebrew word *kadesh* by the word "holy," in the phrase "Remember the Sabbath day, to keep it *holy*," is claimed by some to be erroneous, and that the true import

of the word is "set apart." For this there seems to be the strongest authority in Calvin (Comm. on Gen. ii. 3), and Bishop Horsley (Sermons 22 and 23 on Christian Sabbath). See also the meaning of the word, as illustrated by Dr. Campbell (Dissertation VI., Part IV., prefixed to his Translation of the Gospels.) From this it is claimed by some, that there is no divine command for the *religious* keeping of any day of the week.

On the other hand, there are a large number of Christians who believe that the observance of Sunday is a divine appointment (see Hessey's "Bampton Lectures," which contain an exhaustive discussion of the whole Sunday question), among whom there are some who would have enforced it in the strictest manner; so that the early Connecticut statute before mentioned, would not be held by them too severe, nor the interpretation of the word "necessity" in Arkansas too narrow, *State* v. *Goff*, 20 Ark. 289; while others would have the legislation so shaped as not to make it obnoxious to the community.

It is difficult for any one who has read Dr. Whately's "Thoughts on the Sabbath" to escape his result—that the Lorrd's day has no connection with the Jewish Sabbath, and has no divine origin; neither was it established by the apostles, but by the Church. Those who are embraced in this class, for the most part hold that the religious observance of Sunday is most valuable for the moral nature of man, and that every assistance for its maintenance should be given it by the law. The Jews, Seventh-day Baptists, and other so called sabbatarians, think that the *seventh day* should be the one selected, and would call legislation to assist them in enforcing it. There are many qualifications, not alluded to, in the opinions which have been held, as to what shall constitute a proper observance of one day in seven; but those above stated are thought to give the main features of this many sided question. What manner of legislation will combine and reconcile them all, it is not easy to conceive. Perhaps the statutes of New Hampshire and Illinois would best, theoretically, meet the case. It will be remembered, that no labor in those States is allowed to the disturbance of others; but the case of *Varney* v. *French*, 19 N. H. 233, alluded to above, shows how narrow its terms may become by interpretation. Perhaps if it were left to the jury to say what constitutes a "disturbance," the difficulty might, in a measure, be removed.—*American Law Review.*

THE TWO BRANCHES OF THE PROFESSION.

At the dinner of the Solicitors' Benevolent Association, Mr. Justice Hannen made use of the following expressions:—'I do not hesitate to enunciate my opinion that the two branches of the profession may well be amalgamated. No one knows better than myself that the duties of an advocate are entirely different from those of a solicitor; but, as in many other cases, I know of no means of drawing a sharp dividing line. They merge into one another, and a man who begins his career does not know, until he has been practising for years, for what he may have the greatest fitness, and I believe it would be well to leave it to a man to find out the opportunities that may arise of calling forth the particular qualities and talents that are in him, and so leave it to such occasions to develope whether or no he has a better capacity for carrying on the business of a solicitor or the profession of an advocate. I believe it is peculiar to England that the two branches are separated, and not only peculiar to England in its largest sense, but peculiar to this country, for in almost all of our colonies the two branches of the profession have been amalgamated. I am not aware of any inconvenience that arises from it, and there can be no better training for a young barrister, than to devote himself to the business of a solicitor.' The language of Mr. Justice Hannen is characterised by boldness. After his usual manner, having conceived an idea, he is ready to avow and defend his opinion. Moreover, His Lordship chose a most appropriate occasion and most proper audience for the enunciation of this deliberate judgment.

We propose to place before our readers some considerations on the expediency of the change proposed, and the facility which would be experienced in carrying it into operation. At the expense of being charged with a desire to 'Americanise' an ancient institution, an accusation sufficiently rebutted by the observation that our description is equally applicable to Canada and Australia, we think that we shall best put our case by showing how the system works in the United States, or rather perhaps in a given State of the Union; for example, the State of New York.

Every person who desires to practice as a lawyer in a State of the Union is 'admitted to the Bar;' and it is the rule that barristers form themselves into partnerships consisting of not less than three and of not more than seven persons. No deed of partnership is ever executed, but the members agree by parol, according to the common custom of almost all partners in business in America, in what shares the profits shall be divided. Every lawyer holds himself out to practice in every and to transact every department of legal business. Practically, partnerships are framed with the view of combining in one firm the varied kinds of ability necessary for the successful conduct of the several departments. So also, as might be expected, there is usually a disparity of age between the members, and a consequent disparity of experience. Therefore, if a client brings a bill of exchange for collection, the most youthful member undertakes the work, but if a client brings a Chancery suit of importance or a shipping cause of difficulty, the matter is handed over to the

ablest or most experienced member. The theory and the fact also are, that in each firm are contained all the elements for the due adminstration of any kind of legal business. By these measures the ordinary requirements of all classes of suitors may be satisfied. But it may, and often does occur, that a client of a firm becomes involved in a suit demanding the advocacy of the best man in the profession. At the same time the client is, of course, anxious not to desert the firm with which he has been all his life connected. This contingency is amply met. On this state of things being communicated to the firm, the client proceeds to retain the advocate required. The advocate according to an invariable rule of courtesy, communicates with the firm, so that all parties consent to the arrangement. In such case the advocate obtains his instructions from the firm, and argues the case, and there his duty begins and ends. His charges are paid by the client who retains him, and not by or through the firm.

Let us here pause a moment, and see how the change into such a system could be accomplished in England. Suppose that for the future every person desirous to practise as a lawyer, is 'called or admitted to the Bar.' proper examinations, proper periods and methods of study could be instituted, and the societies of the Inns of Court could undergo such a change as would very greatly enhance the value of their efforts as law universities. No difficulty would be found in meeting the exigencies of legal preparation both in the metropolis and in the provinces. While the new school of practitioners was being formed, the present generation of lawyers could adapt themselves readily to the new order of things. Once break down the artificial barrier, and firms would spring up in every direction, consisting, for example, of one counsel at the common law bar, another cousnel at the chancery, and of a solicitor. Who doubts that such an arrangement would best meet the wants of the public? A man of business, or of fortune, upon whom a sudden legal difficulty has come, does not, in the emergency of the moment, care to be told that a case will be prepared, laid before counsel, and an opinion obtained at the end of a week. He goes to his physician, and gets a prescription *eo instanti*. Why cannot his affairs be tended with equal celerity? Again, there may be a line between the duties of an advocate and an attorney, but it certainly is not a sharp one; and it may occur to some candid persons that it is the system, not the nature of things, that has manfactured the line. The existence of the line is scarcely perceptible in America or in our colonies. Here we have adjusted our lens so that it has become a gulf rather than a line. Again, the argument, if it is to be so called, is put forward that the honour of the Bar is maintained by the existing arrangement. We never have quite understood this expression. But it must mean one of two things, either that a barrister will be demoralised by pursuing the great principle that governs the universe of labour, namely, by getting pay for work done, or that if a barrister could only get at the original client, he would plunder the unfortunate victim. The first notion is contrary, not to all experience, but to all human action whatever, and is based on the monstrous fiction that a barrister is not paid now. The second is met by the suggestion that the barrister is not more likely to abuse his trust than the solicitor. There is one thing further, that in some few cases a barrister is retained in a rascally transaction, and the attorney acts as a veil between the advocate and the client, so that the Court is addressed by an honorable man, in valuable unconsciouness of what is behind. If any person thinks that this constitutes a proper argument, he is at liberty to do so, but we content ourselves by saying that we should be delighted to do anything to confound utterly such methods of action.

To proceed, however, with our comparison. In America, lawyers are liable in actions for negligence. In England, barristers are not so liable, because, as there is no contract to pay the barrister, there is no consideration to support the contract. Once sweep away the dogma that a barrister shall not recover for work done, and of course the corresponding obligation to perform work with a reasonable degree of skill and care arises. In reality the Bar would sustain no damage. English barristers do neglect their duties, and are most rarely, if ever, incompetent. They would have nothing to fear, while the client would enjoy his right, under protection of the law, to have that done for which now he pays just as much as he ever will pay in the future.

It is clearly impossible that, after an amalgamation of the two branches has been consummated, the law of costs can stand for an hour. We never heard any man, except a law-accountant, say a good word for costs. They are based on no intelligable principle: they plunder the client in a trumpery case, and let him off much too easily in an important case. It is not in human nature for a man who has only 500*l.* at stake in a cause or other legal matter to pay willingly a large bill, because his attorney has been put to considerable trouble. On the other hand, a matter involving many thousands of pounds may be finished at a lower figure, to the unfair detriment of the attorney's pocket. In America the system is simple enough. The firm send in their bill, assessing the amount to some extent with reference to the trouble and expense incurred, but more with reference to the value of the property recovered or dealt with. In the long run the lawyers are amply remunerated, and the clients are satisfied. If a dispute arises upon the charges of the bill, and an action is brought by the firm, the plaintiffs call the evidence of other lawyers to show that the charges are customary and fair, precisely

as would be done in England in any action other than one brought by an attorney.

Such are the main features of the American system. If introduced here the general public would, in our opinion, be benefited. Clients would be brought into immediate contact with their legal advisers, with the result that advice would be given more speedily, with more accurate perception of the facts, and with more opportunity for guidance in the further carriage of the matter; that each firm would contain within itself complete powers of conducting every description of business; that much unnecessary labour and expense would be saved to the profession; and that remuneration would be based on a plan more satisfactory to the client and to the lawyer. Then what would the profession lose? Certainly the Bar would not by this change lose its honour? That is to be preserved not by artificial rules and irrational restrictions, but by the good sense and honesty of the individual members. No doubt the attorneys and solicitors will lose what may be called the patronage of the Bar, but it is not clear either that the patronage is rightly lodged, or that it is not a nuisance rather than a prize to those who are driven to exercise it. Lord Melbourne detested episcopal patronage, and took to his bed when a see was vacant. Are there no London solicitors who experience similar sensations with regard to the choice of counsel? But we say boldly that the general public ought to enjoy that patronage, and that a man ought to choose his own advocate, although under the present system a solicitor is amply justified in refusing responsibility, unless he is left a free agent in all such matters. Then the suggestion of Mr. Justice Hannen must not be overlooked that a young man cannot discover what is the precise bent of his talent, until it is too late to adapt his course to that inclination, neither indeed, it may be added, can he anticipate in which branch of the profession he may be most aided by connection or capital or the like, all of which in a highly civilised country must tell in the struggle of life.

These, then, are among the considerations that seem to support the proposition of Mr. Justice Hannen. Even the opponents of the change admit that the force of events is becoming too strong for them. The mere fact that there is a vast system of Courts in which attorneys appear as advocates, but in which barristers are precluded from acting as attorneys, is enough, on the simple principle of fair and equal dealing, to condemn so one-sided an arrangement. It is well recognised that law and equity are daily approaching each other, that codification will consummate their union, and that the amalgamation of the two branches would then be but the work of time But in our view there is no need for delay. On the contrary, we believe the proposed change to be not merely salutary, but one to be speedily completed in the true interests of the profession and the public.—*Law Journal.*

AMALGAMATION.

Amalgamation is a word as familiar to lawyers as to chemists or metallurgists; the amalgamations of insurance and other joint-stock companies have been a very fertile source of employment to all ranks of the profession. It is not, however, of these amalgamations that we are now thinking, but of that which is to take place between the bar and the attorneys and solicitors. It is now some years since this proposition was first broached, and though it has not yet found much favour either with lawyers or those who employ them, it is every now and then revived to become the theme of more or less discussion. In the present instance, the revival has been occasioned by a strong opinion in favour of the change delivered by Mr Justice Hannen, at the anniversary dinner of the Solicitors' Benevolent Association. Mr. Hinde Palmer, Q.C., in responding to the toast of "the Bar," took occasion to express a hope that the day was far distant when any change would be made, which should place the bar in direct communication with suitors, believing as he did that such a change would diminish the honour and utility of both branches of the profession. After this it was hardly possible for the learned chairman, holding an opinion far beyond the contrary to Mr. Hinde Palmer's views, not to give utterance to his own ideas upon the topic. Any opinion delivered by a judge held in such deserved esteem as Mr. Justice Hannen is entitled to the highest respect; and it is very true indeed, as he observed, that all good opinions were in the minority once. As to this one opinion, however, we are unable to agree with Sir James Hannen, believing that on this subject his opinion is not only in the minority, but is so deservedly.

The present condition of the legal profession has been arrived at by a very gradual growth. If we could go back to the earliest days we should find the prototypes of our modern barristers holding direct communications with, and receiving direct payments from, the litigants who consulted them. The attorneys and solicitors were hardly then, as they are now, a distinct branch of the law. But as the study and practice of the law grew apace, certain individuals acquired the habit of "attorning," and of course a man who had discharged that function several times was a better assistant than one less experienced in the forms of the law. Thus Attorneyship came to be a distinct vocation, a sufficient employment to occupy the whole of one man's time and energy. The attorneys gradually rose to the dignity of a profession, and as their importance increased, provision was made for admitting none but properly qualified persons. Indeed, as far back as 15 Ed. II attention seems to have been turned to this, for the statute, cap. 1 of that year restricts the power of admitting them to the Lord Chancellor and Chief Justice, prohibiting the clerks and servants of the barons

of the Exchequer and justices from doing so, and forbids the barons and justices themselves to admit any, "but only in pleas that pass before them in the benches and places where they be assigned by us."

Thus the attorneys and solicitors grew to be an important branch of the law; and as they became a distinct body by themselves, their particular functions became distinctly marked out, as contrasted with those of the bar. It seems, therefore, that the bar and the solicitors have gravitated into their present places in obedience to the requirements of convenience; and this to our mind, is a strong *a priori* argument (we do not put it higher) in favour of the arrangement which has thus been produced.

Mr. Justice Hannen recognizs the great difference between the duties of an advocate and those of the solicitor, but thinks it impossible to draw a line of demarcation. We confess that we cannot appreciate the force of this corollary. If a line of demarcation is intrinsically advisable, the mere difficulty of assigning it is not a sufficient reason for doing without it; and, indeed, it is but seldom that a dividing line can be drawn in any matter without the immediate adjacencies bearing a strong resemblance to each other. Here, too, we have a line existing, with this strong recommendation—that it is not a line which has been drawn, but one which (if we way be permitted the confusion of metaphors) has *grown up*. It is said also that the present division of the profession into two classes works a hardship upon young men, who cannot at once decide for which branch they are best adapted. We cannot acquiesce in this. The functions of the two branches are admittedly distinct, and this being so, justice to the public demands that none should be able to transfer himself from one branch to the other without undergoing the proper training.

But it is said that as a fact the system which has grown up is *not* convenient. The mere fact, again, that other nations manage to live and litigate without such admissions, is not even a *prima facie* objection, until it is shown that they are on that account better off than we. It appears to us that, regarded in the light of the division of labour, the system is very convenient. The division of labour, like everything else, may be carried to an excess, but the advocate who professes the theory of law, and the lawyer who stands between him and the client, and transacts the practical and formal business required by the law, seem to us persons whose functions are much better discharged by separate individuals. It is said that if the amalgamation were effected, we should have this provided for by the universal formation of firms consisting of an advocate, one common law man, one chancery man, and so forth; but if so great a demolition is to be made only in order that what was once done by law may be carried out in a sort of *cy pres* manner by this process, we really think the pick-axe had better not begin its work at all. At present, any one or two solicitors, by retaining counsel when necessary, can practise, under their own sole control and responsibility; and there is far more free trade for solicitors than there would be under such a system of partnerships. Again, we cannot think that the change would improve, either in point of quality or celerity, the advocacy or the advice for which clients come to lawyers. We believe that the man who has personally seen or heard the client's case is not as a rule in a positian to give the soundest advice. The client asks, what will the court or jury think of this? and solicitors will bear us out when we say that it is much harder than people suppose, to dismiss from the deliberatiog a quantity of things, shades, and tones, of which you become sensible, or which the clients will place before you, but which would be disregarded, or would never even make their appearance in court. It is hareer, we believe, for a lawyer to say how the court will view a case in which he himself is litigant, than to pronounce upon a case from the instructions drawn up by a competent ettorney. It is one thing to pick out all that is material, but it is another to get rid of the impression which the rest may have produced on your mind. And if the functions of the counsel and the attorney are such as are best discharged by different individuals, *ergo*, no time is wasted by their being kept apart. English law is more complicated than it need be, but if simplified to the utmost, social and commercial intricacies would still require it to be complicated; and this being so, no reasonable being could expect to have legal opinions considered and delivered in the time which a physician takes to ask a question, feel a pulse, and write a prescription.

It is no doubt important that the barrister and the soicitor should each be able to appreciate the other's work. Under the existing division, we think that they do, and the practice which is largely on the increase, among both solicitor and bar students, of studying for a certain time the practice of *both* branches, will promote this for the future. No doubt there are changes which might be made to great advantage, for instance, as to the computation of solicitors' costs, and the payment of conveyancing; but in order to deal with these matters it is not necessary to overhaul the whole fabric.—*Solicitors' Journal.*

The shortest will extant is possibly that of Lord Wensleydale, which was proved on the 8th ultimo. It runs thus:—"This is the last will of me, James, Lord Wensleydale. I give all my property, real and personal, and all I have in the world, and that I have the power to dispose of, to my beloved wife Cecilia, her heirs and executors, absolutely. This 25th day of November, A. D. 1863. WENSLEYDALE." The estate was sworn under £120,000.—*South London Press*

ONTARIO REPORTS.

PRACTICE COURT.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

Maitland et al v. Cameron.

Issue—Irregularity—Service of notice of trial.

1. A joinder of issue should be properly entitled, and when the name of one of the plaintiffs was omitted it was *held* to be irregular.
2. Service of notice of trial, &c., on a person alleged to be a partner of the defendant, *held* insufficient, without some evidence of his authority or duty, either express or implied, to receive service of notices or papers.

[Practice Court, E. T., 1868.]

During Easter Term, *Anderson* obtained a rule calling on the plaintiffs to show cause why the verdict should not be set aside for irregularity, and for a new trial, with costs, on the grounds—1. That no joinder of issue in the cause was served. 2. That notice of trial was not served personally on defendant, who appeared in person, nor did it come to his knowledge in the proper time before the assizes, notice of such irregularities having been given to the plaintiffs' attorney before the trial, &c.

A. Kirkpatrick showed cause during the same term, referring to Reg. Gen. 1865, 138.

The defendant, in person, supported his rule, citing *Fry* v. *Mann*, 1 Dowl. 419; *McGuin* v. *Benjamin*, 1 Cham. R., 142; *Chase* v. *Gilmour*, 6 U. C. Q B, 604.

It appeared from the affidavits and papers filed that the joinder of issue served on the defendant was not properly entitled in the cause, the name of one of the plaintiffs being omitted, and that the notice of trial was handed to a partner of the defendant, at the chambers of the defendant, the defendant not being present. That as soon as the notice of trial came to the defendant's knowledge, on the 19th March, (the assizes in Kingston, where the trial was to be heard, commencing on the 26th March,) the defendant caused the defective joinder, the issue book and notice of trial to be returned to the plaintiff's attorney, with a written notice to the effect that no joinder of issue had been served, nor any notice of trial served personally on the defendant, and that if the plaintiff proceeded with the trial of the issue, that the defendant would move to set aside the verdict for irregularity. Notwithstanding such notice the plaintiff proceeded and took a verdict, the defendant not appearing or making any defence.

In his appearance the defendant gave his address, "his chambers, on King-street"

Morrison, J.—As to the irregularity in the joinder of issue, I think the objection must prevail; the defendant pleaded an equitable plea, to which the plaintiff had to reply, and the replication, although only taking issue on the defendant's plea, is a pleading, and, as such, requires to be served, and as said by Mr. Chitty, in his first volume on pleading, the names of the parties should be accurately stated in the margin. Here the names are inacurately stated, and, so far, irregular, and as notice of the irregularity was given to the plaintiffs as soon as the joinder came to the defendant's knowledge, the plaintiffs proceeded at their peril.

Then as to irregularity in, or rather the defective service of the notice of trial, as well as the joinder of issue, I am inclined to think that the service was not a good one. The clerk who made the service went to the defendant's chambers, on the 12th March, where he saw a partner of the defendant's, of whom he enquired whether the defendant was there, to which he replied that defendant had not come down from his residence, and then the clerk handed the papers to the partner. The general rule, as I take it deducible from the various decisions is, that a notice must be served on some person at a defendant's residence or chambers authorized to receive letters, notices or messages, such as a servant, a clerk of the defendant; that if the service is on a person, such as a friend of the defendant, staying at defendant's house, it is insufficient, and that, even if the party who served the notice swears that he *believes* the person served had authority to receive it.—*Brandon* v. *Edmonds*, 2 Dowl. N.S., 225; *Rowland* v. *Vitzitelly*, 1 D. & L 767. I cannot say that a partner of a defendant is a person authorized to receive such notices or papers, or that it is his duty to do so. Here it is not stated or shown that the partner was so authorized, or that he was in the habit of doing so for defendant. For all that appears on the affidavits filed by the plaintiffs on showing cause, this gentleman, assuming him to be a partner of the defendant, may have been at defendant's chambers, casually, on the day he was handed the papers, for it is not shown that he and defendant occupied the same offices. He may have been there as any stranger might be. The defendant swears that the notice of trial, &c., only came to his knowledge on the 19th March, and on the same day the plaintiffs' attorney was notified of the irregularities of the defective joinder, and the notice of trial returned. Under these circumstances I am constrained to give effect to the objection, and to make the rule absolute for setting aside the verdict.

Rule absolute.

COMMON LAW CHAMBERS.

Fields v. Miller.

Appeal—Forcing appellant to proceed—Judgment for costs of defence—Bond—Con. Stat. U. C., cap. 13, sec. 16.

Giving the necessary security is a proceeding prior to settling a case for appeal.

If an appellant fails duly to prosecute an appeal pursuant to leave, the respondent will, when leave to appeal has been given, be protected by the court withdrawing the leave.

Under Con Stat. U. C., cap. 13, sec. 16, sub-sec. 4, only one bond is requisite on a judgment for costs alone, that part of the statute referring only to judgments for the payment of *money*, as distinct from costs.

[Chambers, March 28, 1868.]

This was an action of trespass, in which judgment had been entered for defendant, pursuant to a decision of the Court of Queen's Bench; and upon which judgment execution was issued for the costs of defence.

The plaintiff gave notice of intention to appeal to the Court of Error and Appeal, on leave given for that purpose. He then filed the bond for security for the costs in appeal, and due prosecu-

tion of the appeal as required by the act, and in the form given in the orders of the court, with affidavits of justification and execution.

Notice was given of an intended application for the allowance of this bond. In pursuance of this,

O'Brien, for the plaintiff, now moved for the allowance of the bond, and for a fiat to the Sheriff of Kent, under the Con. Stat. U. C., cap. 13, sec. 16. to stay the execution.

J. B. Read for the defendant, opposed the allowance of the bond.

1. The appeal should be first settled, for otherwise there might be a difficulty in forcing he appellant to proceed with the appeal: *Rowe* v. *Jarvis*, 14 U. C. P. 244.

2. The judgment of the court is for the payment of money, namely, the costs of defence; and the case comes within the exception contained in Con. Stat. U C, cap. 13, sec. 16, sub-sec. 4; and the execution should not be stayed until security is given for these costs.

O'Brien contra.

1. The court can, if the appellant fails to prosecute his appeal, withdraw the leave to appeal, and so prevent any injustice to the defendant: *Clissold* v *Machell*, 25 U. C. Q. B 546

2. The Legislature evidently intended, by the words, "judgment, &c, directs a payment of money," a judgment for a plaintiff, on a money demand, not costs merely, or, as in this case, the costs of a defence. This was the view taken by the Chancellor in a late case of *Heward* v. *Heward* (not reported).

Hagarty, J.—Giving the necessary security is a proceeding prior to settling the case for appeal; and the court will protect a defendant, if the plaintiff does not proceed with his appeal, in the manner suggested in *Clissold* v. *Machell*.

Unless there is an express decision to the contrary, I must hold that the statute does not contemplate the necessity of a plaintiff securing a defendant against the costs of the judgment he is appealing against. It would be a great injustice to require security in such a case, and I think the bond produced is sufficient. I shall therefore allow it, and stay the execution

Bond allowed.

Hesketh v. Ward.

Insolvent debtor—Application for discharge—Con. Stat. U. C. c. 24 s. 41 and c. 26 s. 7 distinguished—Reading examination filed on former application—Right of debtor to file affidavits explanatory of his answers on application for discharge—Right of debtor's counsel at examination to cross-examine debtor.

W. a defendant in close custody under a *ca. sa.* applied for the third time for his discharge, under Con. Stat. cap. 26, secs. 7 & 8.

Held—1. That a defendant cannot be committed on a *ca. sa.* ordered to issue against him under that Act.

2. Where several examinations had, plaintiff entitled to read the former examinations, on showing cause to application for defendant's discharge, for the purpose of contradicting answers on last examination only.

3. Defendant entitled to file affidavits explanatory of his answers, but not to make out a new case.

4. When defendant in close custody, execution creditor cannot compel him to be examined.

Semble.—As to right of defendant's counsel to take part in the examination of his client.

Quære.—Can a prior examination under Con. Stat. U. C. cap. 24 sec. 41, be referred to and acted on, and imprisonment awarded on it, after a subsequent examination had under Con. Stat. U. C. cap. 26, sec. 7.

[Chambers, April 13, 1868.]

The defendant, a debtor in close custody in the gaol of the county of York, under a writ of *capias ad satisfaciendum*, pursuant to sec. 7. cap. 26. Con. Stat. U. C., was for the third time examined as to his means of paying the judgment in this cause.

He had failed in two former attempts to obtain his discharge, owing to his answers having been held unsatisfactory.

Mr. Justice Adam Wilson, before whom the application for his discharge, after the second examination, was made, refused it on the ground that the answers were unsatisfactory, and, in his judgment, pointed out in what respect they were so, and suggested information that the defendant ought to give before he would be entitled to his discharge, and gave plaintiff leave to elect either to allow defendant to supply the deficiencies in his examination by affidavit, or to have the application discharged and a new examination of defendant had. The plaintiff elected the latter course. The summons was discharged, and defendant served another ten days' notice under sec. 8 of cap. 26, Con. Stat. U. C., and before the expiration of the ten days he was re-examined.

After the third examination he again applied for his discharge from custody, under Con. Stat. U. C. cap. 26, secs. 7 and 8, filing the usual affidavit, that he was not worth twenty dollars, exclusive of his necessary wearing apparel, &c., and that he had submitted to be examined pursuant to an order granted for that purpose under sec. 7 of said Act. An affidavit of service of the ten days' notice required by sec. 8, an affidavit of his own, explaining some of his accounts, and giving the information required by Mr. Justice Adam Wilson, affidavits of F. H. Bills (his brother-in-law), and others, corroborating his statements, and supplying some deficiencies therein, and an affidavit of his attorney, who stated that he attended the examination on defendant's behalf, and at the close thereof, by plaintiff's counsel, requested leave (1) to cross-examine defendant upon his answers; (2) to ask defendant questions explanatory of his answers; and (3) to examine him touching matters brought out in his examination, and upon extraneous matters;—that plaintiff's counsel objected thereto, and the examiner refused to allow him to ask any of such questions; and that he believed that had he been allowed so to do, he would have been able to bring out at the examination all the matters contained in the affidavit of defendant, filed in support of this application.

This summons also came on for argument before Mr. Justice Adam Wilson, in Chambers, on the 2nd March, 1868.

For the plaintiff, it was contended that the defendant could not file any affidavits in support of his application, but must stand or fall by his answers; that *the examination* must be held satisfactory before the defendant would be entitled to his discharge; that the examination was not satisfactory, and therefore defendant was not entitled to his discharge.

For the defendant, it was urged that his counsel should have been allowed to examine defendant, as above stated; for if the examiner was correct in not allowing him that liberty, the whole conduct of the examination was in

the hands of the plaintiff, whose object it was to keep defendant in custody, and who, of course, could ask just such questions as he chose, to accomplish that purpose; that defendant should be allowed to explain answers at his examination, which, although to him they might seem satisfactory, yet to a professional gentleman quite the contrary, and that he must have an opportunity of doing this at some time and in some way, and that the proper course was by affidavit upon this application; and that, taking the examination and affidavits together, a case was made out clearly entitling defendant to his discharge.

The learned Judge, without deciding whether or not the examiner was correct in refusing defendant's counsel to take part in the examination, said he thought defendant should be allowed to explain his answers, and so allowed the affidavits filed by him to be read, and on the 23rd March following gave his judgment, which concluded as follows:

"I think the defendant has made a case which entitles him to be discharged, on the ground of having *satisfactorily answered* according to the statute. I am not, however, satisfied that he has dealt with his property in the manner represented fairly towards the plaintiff as his creditor; and as I do not think I should decide what imprisonment to impose upon him without hearing him expressly upon that point, I shall forbear making any order until he serves notice on the plaintiff, or his attorney, that he will apply to be discharged, because he has answered satisfactorily, and because he has not made away with his property to prevent its being taken in execution."

Defendant immediately thereafter served notice that he would apply for his discharge to Mr. Justice Adam Wilson, on the ground that his answers had been held satisfactory; and accordingly application was made on the 10th day of April following, when—

J. A Boyd shewed cause, and contended that the defendant had been examined three times, and every examination on the face of it showed that he (defendant) had made away with his property for the purpose of defrauding plaintiff, and that he should not be discharged from custody without a committal for some time at least; and that it should be made a condition precedent to his discharge that he should give the plaintiff an assignment of a number of debts due to him and disclosed in the examination.

For the defendant, it was argued that his first examination was had under sec. 41 of c. 24 Con. Stat. U C., at the instance of the plaintiff, and upon which the plaintiff did nothing. The last two examinations were had under sec. 7 of c. 26 Con Stat. U C., and an examination under this latter Act is for an entirely different purpose than one under the former. The former is for the benefit of the creditor, the latter for the benefit of the debtor; the one enables the plaintiff to obtain a writ of *capias ad satisfaciendum* against the defendant for fraudulent distribution of property, or, in case of contempt, in refusing to attend the examination, or improperly answering an order of committal; the other (cap. 26) provides for the examination of a debtor in close custody, and is an examination which a debtor must submit to as a condition precedent to his obtaining his discharge (see sec. 8 of cap. 26), and there is no punishment provided in case a debtor refuses to be examined under this section, only that it deprives him of the right to apply for his discharge, and as long as he refuses to be examined he will have to remain in custody. In other words, the former examination is compulsory, the latter voluntary. There is, therefore, no power to commit defendant on his two last examinations, unless his case comes within sec. 11 of c. 26, which it does not. Then, as to the first examination under sec. 41, c 24, there are two modes of punishment pointed out: the Judge has power either to order a *ca. sa* to issue, or to order defendant to be committed; and it has been held in *Wallis* v. *Harper*, 7 U C. L J 72, that an order to commit can only be granted when the defendant has been guilty of some act of contempt, as in refusing to be examined. In other cases, as when the examination discloses a fraudulent disposition of property, the proper course is to order a *ca. sa.* to issue; therefore, in this case, no order to commit could be made, for defendant has been guilty of no contempt; at most, a regular *ca sa.* could be ordered, and defendant is now in custody under a *ca sa.*

Plaintiff has waived his right to ask to have defendant committed on first examination by allowing some eight months to elapse since that examination, and in the meantime has twice examined defendant under cap 26 He (plaintiff) cannot now, when he finds defendant is going to be discharged, fall back upon that examination and ask to have him committed; and as defendant's examination has been "held satisfactory," and as his case does not come within section 11 of cap. 26, he is entitled to his *immediate* discharge See Con. Stat U. C., cap 24 sec 41, cap. 26. secs. 7, 8 & 11. *Wallis* v. *Harper*, 3 Prac. Rep. 50; *Ib.* 7 U C. L J. 72.

ADAM WILSON, J.—The 41st sec. of ch 24 does not apply to cases in which the party is in *close* custody. In such cases the general rule of law is—the creditor can have no other species of execution, and therefore an examination as to property is of no moment.

In such a case, the debtor cannot be compulsorily examined by the creditor.

The direction that a *ca. sa* may be ordered, or a committal to *close* custody, if the debtor be in the limits, supposes this construction of the Act.

The 26th section is the one precisely applicable to this case, for here the debtor is in *close* custody, and though, by sec. 13, the like examination may be had of the debtor though on the limits as may be had in close custody, yet, in either of these cases, it is not properly a *compulsory* examination, but one which the debtor must undergo as the condition on which his application to be discharged from confinement can alone be entertained. He is not obliged to answer interrogatories or to submit to an examination—that is, he cannot be specially punished for not doing so; the only result is that his application for discharge will not be received, or will not be successful.

I cannot award imprisonment for wrongly parting with his property to evade the payment of this judgment, for such conduct is not within the enactment of the 11th section—this is manifest from the section itself, and is confirmed

by the decision in *Wallis* v. *Harper*, 7 U. C. L. J. 72.

I am not quite clear that the examination of September last, while the prisoner was on the limits on mesne process, though *after* judgment, can now be considered; for, perhaps, I cannot order him *to be committed* to gaol, as he is now *in* gaol, nor can I order a *ca. sa.* to issue against him, as he is in on a *ca. sa.* at present, and it may be that the taking him on a *ca. sa.* after *that* examination and examining him twice while a prisoner upon the *ca. sa.*, since the former examination, prevents the plaintiff from falling back upon the previous examination for the purpose of showing it to have disclosed a parting with his property to defeat or defraud his creditors or any of them, and from claiming the right to have him committed to custody under the 41st sec. I do not see why the plaintiff might not examine the defendant after his discharge, if his answers still showed an improper parting with his property, and apply then to have the defendant committed to gaol, by way of punishment, under that section.

And this view naturally suggests—why do this again when it has been done already, and when it now appears that this improper conduct has been committed, and why not commit upon the present disclosed misconduct of the defendant?

The defendant may be committed by way of punishment, though he is now in custody under a *ca. sa.*, for he would be discharged from further custody on the *ca. sa.* and be detained or committed under the order.

When the debtor is punished under ch. 26 sec. 11, he is *re-committed* under the *ca. sa.* and. Judge's order, limiting the time—probably the detainer or cause of detention that would be returned, on a *habeas corpus* would be the *ca. sa.* alone;—the Judge's order merely limiting the time of imprisonment to be suffered under the *ca sa.*

The fact of his being now in custody, or already committed, may be no reason why he should not be committed under the order on his being discharged from the *ca. sa.*

Then the question is, can the former examination be referred to and acted upon, and imprisonment be awarded on it, after the later proceedings before mentioned have been taken; do the later proceedings supersede the effect of that examination and the examination itself; if not, why may it not be still looked to and acted upon?

My general conclusion is it may be; but before deciding, it being a new case, it may be better to consult with one of my brother Judges on the subject.

13th April.—Having seen Mr. Justice Hagarty, he is of opinion that the prior examination should not now be looked to, but that the plaintiff should be left to renew his examination of the defendant if he please. This, I must say, is not my own opinion; but in a case of imprisonment or liberty I would rather acquiesce in the discharge being granted than detain the defendant on a doubtful matter, with the opinion of one of my brother Judges in favour of the discharge.

*Prisoner discharged.**

* *See* report of former application in 4 Prac. Rep. 158. [Eds. L. J.]

ENGLISH REPORTS.

COMMON PLEAS.

Bramble v. Moss.

Where issue is taken on a plea which sets up a composition deed under the Bankruptcy Act, 1861, proof must be given to support the plea that the requisite proportion of the creditors have assented to the deed.

The certificate of registration and the debtor's affidavit in pursuance of paragraph 5 of section 192 do not constitute such proof.

[16 W. R. 649—April, 1868.]

The declaration was on the money counts. The defendant pleaded a composition deed, the plea averring (*inter alia*) that a majority in number, representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to ten pounds and upwards, did, in writing, assent to and approve of the said deed. It also averred that all conditions precedent had been performed, and all times elapsed necessary to make the deed a bar to the action.

At the trial before Smith, J., at Guildhall, on the 19th February last, the defendant put in the deed and proved its execution by the attesting witness. He also put in the certificate of registration under the hand of the chief registrar, and the seal of the court, and an office copy, duly sealed, of the affidavit required by the 5th clause of the 192nd section of the Bankruptcy Act. 1861. No other evidence was given that the requisite number or proportion of creditors had assented to the deed.

It was objected by the plaintiff's counsel that such evidence was necessary, and the learned judge being of that opinion the plaintiff had a verdict, leave being reserved to move to set it aside and enter it for the defendant if the Court thought that the evidence produced was sufficient to prove the plea.

Besley now moved accordingly.—The certificate of registration is conclusive; it is the act of the Bankruptcy Court, and this Court cannot inquire whether it was properly given. *Kelley* v. *Morray*, 35 L. J. C. P. 285, 14 W. R. 939, shows that the certificate of the appointment of an assignee is conclusive. [Smith, J.—There the certificate states the appointment of the assignee; here it does not state that a majority have assented.] No; but the affidavit does, and that is under the seal of the court, [Bovill, C. J —The affidavit is only that of the debtor. The certificate shows that the affidavit has been filed; not that its contents are true.] He referred to the 206th section. [Bovill, C. J.—Does that section do more than make a copy evidence?] Secondly, the objection is not open to the plaintiff, as the replication merely takes issue on the plea, which avers performance of all conditions precedent necessary to make the deed binding; and under the 57th section of the Common Law Procedure Act, 1852, the plaintiff ought to have specified the conditions precedent whose performance he intended to contest.

Bovill, C. J.—The evidence is insufficient to support the plea, the whole of which is put in issue by the replication. Section 206 makes duly authenticated copies of proceedings admissible in evidence, but its only object is to save the production of the original documents. The copy

of the affidavit is evidence that such an affidavit was made, but there is no enactment which renders either the copy or the original evidence that the matters contained in it are true.

Byles, J.—I coincide in all my Lord has said. It has been the universal practice to prove that a majority of creditors have assented, and there is an easy and inexpensive way of doing so by calling the debtor himself.

Keating, J.—The affidavit is required to obtain registration, and the registrar is bound to register the deed on its production. He cannot inquire into its truth. None of the sections make the statements contained in the affidavit evidence. The copy is evidence that the affidavit is made and delivered to the registrar, but of nothing else.

Smith, J.—The 192nd section makes these deeds binding, provided certain conditions are fulfilled. The first of these is that a majority in number representing three-fourths in value of the creditors of the debtor whose debts amount to £10 and upwards shall assent to the deed. The fourth and fifth conditions require that the deed shall be registered and an affidavit made. The certificate and affidavit are evidence that these latter conditions have been fulfilled; they are no evidence that the first has been complied with.

Rule refused.

Baines v. Lumley.

Statute of Limitations—3 & 4 Will. IV., c. 27, ss. 3, 8.

A. let land to B. by parol from year to year, reserving rent payable in March and November. The last payment of rent was in 1846; rent again became due in November, but was not paid. A. died in December of the same year, and B. retained possession. In ejectment by A.'s heir,

Held that the time under the Statute of Limitations ran from the last payment of rent, and not from the death of A., as the case fell within the 8th, and not within the 3rd section.

Semble, that if the 3rd section applied, A. was not shown to have continued in receipt of the rent till the time of her death, so as to bring the case within it.

[16 W. R., 674; April 18, 1868.]

This was an action of ejectment tried before Lush, J., at the last Durham assizes, when the verdict was entered for the defendant, with leave reserved to the plaintiffs to move to enter it for them.

The action was brought by the plaintiff, claiming through a Mrs. Kitchen, to recover land in the county of Durham which formerly belonged to her. Mrs Kitchen lived in London, and the land in question was occupied under her by a person named Gibson, through whom the defendant claimed, on a parol tenancy from year to year, the rent becoming payable in the May and November of each year. The last payment of such rent to her that the plaintiff could prove was in March, 1664; another half-year's rent became payable to her on the 13th of November, 1846, but was never paid. Mrs. Kitchen died on the 22nd of December, 1846, and this action was commenced in October 1866. As more than twenty years have elapsed between the last payment of rent and the date of the writ, the verdict was entered for the defendant.

Stephen Temple, Q.C., now moved, pursuant to the leave reserved, to enter the verdict for the plaintiff, and contended that the Statute of Limitations (3 & 4 Will. IV. c 27 s. 2) only ran from the death of Mrs. Kitchen, and that, therefore, the action was not barred. The case fell within the 3rd section of the Act, which provides as to the right to bring an action "to recover any land or rent . . . that when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right be deemed to have first accrued at the time of such death." Mrs. Kitchen continued in receipt of the rent till her death within the mean of the section, for it is not necessary that the rent should be paid with absolute punctuality.

Bovill, C.J.—I am of opinion there should be no rule. The case is governed by sections 7 to 9 of the Act relating to tenants, and the section which more particularly refers to the case is the 8th, which is as follows:—"When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen)." In the early part of that session the word "rent" applies to a rent charge, in the latter part to rent reserved The last time rent was paid here was in March, 1846. Mr. Temple contended that the case fell within the third section, and not within the 8th; but that is disposed of by the case of *Doe* v. *Angell*, 9 Q.B. 328. Lord Denman there says, p. 355, that the word "rent, in the 2nd section," is used in the sense of rent charge only, as was stated by Tindal, C.J., in the judgment in *Paget* v. *Foley*, 2 Bing. N.C., 679, 688, and as is expressly held by the Court of Exchequer in the case of *Grant* v. *Ellis*, 9 M. & W. 113. The word is used in the same sense in the 3rd, 4th, and 5th sections. In the 7th section it is used in the same sense . . . In the 8th section the same sense must be given to it in the earlier part of the section; but at the close of it the word is manifestly used in the other sense—viz., that of rent reserved." That therefore being the true construction of the Act, the case is governed by the 8th section, and not by the 3rd. But even if it were otherwise the case is not brought within the 3rd section, because it is necessary to show that the deceased continued in receipt of the rent till her death; and here the rent became due on the 13th of November, and I take it as a fact that that rent was never received.

Byles, J., concurred.

Montagu Smith, J.—What "last" happened here was the receipt of rent in March, 1846, more than twenty years before action.

Keating, J.—I did not hear all the case; but so far as I did hear it I quite agree.

CHANCERY.

Atiwood v. Maude.

Partnership—Dissolution—Return of premium.

M., a solicitor, took A. into partnership for seven years, receiving a premium. Disputes afterwards arose between the partners, M. charging A., who had very little experience, with incompetency; and A. anticipated M. in filing a bill of dissolution, two years only of the term having elapsed.

The Court, being satisfied upon the evidence that M. had, when the agreement was made, been aware of A.'s inexperience, and had taken the premium on that account, decreed a return of premium proportionate to the unexpired term.

[16 W. R. 665; Feb. 21; March 11, 1868.]

The bill in this case prayed a dissolution of partnership and a return of a premium which had been paid by the plaintiff, or a proportionate part thereof.

The facts were as follows:—

In 1864 the plaintiff and defendant entered into a seven years' partnership as solicitors as from Jan. 1, 1864, under articles of agreement dated Jan. 7. 1864. The defendant at this time had practised on his own account for some years, but the plaintiff, having been but a short time admitted, had had very little experience of the conduct of a solicitor's business, and of this the defendant was aware.

The agreement provided that the plaintiff should pay the defendant £800 as purchase-money for one-third of the profit of the defendant's business, and a similar part of the office furniture, &c., the calculation being stated to be made on the basis of the defendant's business being worth £600 per annum. The plaintiff was to bring £200 into the firm as capital. There was also a clause providing for the event of either partner dying during the continuance of the partnership, and it was provided by this that if the plaintiff should die in the first year the defendant should repay to his representatives £200, and if in the second year £100; after two years no repayment of any premium to be made.

The £800 and £200 were duly paid by the plaintiff and the partnership commenced, but disagreements subsequently arose between the partners accompanied with much mutual recrimination, and the defendant charged the plaintiff with negligence and incompetence. At length, on Feb. 13, 1866, the defendant wrote the plaintiff a letter saying that it was evident that their partnership must be dissolved, and that he had already instructed counsel as to filing a bill. The plaintiff, however, anticipated the defendant by filing his own bill on Feb. 16 following. As to the charges made by the partners against each other there was some conflict of evidence.

Vice-Chancellor Stuart decreed a dissolution of the partnership, but, holding that its necessity had been occasioned by the plaintiff's conduct, refused to order repayment of any part of the premium: against this latter part of the decree the plaintiff appealed.

Kay, Q. C. and *North*, for the appellant.—In the absence of fraud a dissolution does not enable one partner to put the whole premium into his pocket: *Bury* v. *Allen*, 1 Coll. 589; *Astle* v. *Wright*, 23 Beav. 81; *Featherstonhaugh* v. *Turner*, 25 Beav 382; *Pease* v. *Hewitt*, 31 Beav. 22, 10 W. R. 585; *Hamil* v. *Stokes*, 4 Price, 161. In the absence of fraud or misconduct on the part of the partner who paid the premium, the Court is accustomed to order a partial return proportioned according to the unexpired term of the partnership. Here the defendant alleges neglect and incompetence on the plaintiff's part but no neglect is proved, and as to incompetence, the defendant well knew, when treating for the partnership, that the plaintiff had had but very little experience, and received from the plaintiff a premium to compensate him for the inconvenience which might be occasioned thereby. In *Therman* v. *Abell*, 2 Vern. 64, a return of premium was made in spite of misconduct of the party who paid it. In *Bury* v. *Allen* (*ubi sup*) the bill for dissolution was filed by the partner who claimed and obtained the return of premium.

Bacon, Q. C., and *Whitehorne*, for the respondent.—The principles deducible from the cases are—(1) that if there be fraud on the part of the partner who received the premium, the whole is ordered to be returned; (2) if the partnership be otherwise determined by the act of the partner receiving the premium, there is a proportionate return, the amount being in the discretion Court; (3) if the partnership be determined by the act of the partner who paid the premium, or in consequence of something which was in the contemplation of the parties, when the partnership was formed there is no return of premium. Here the defendant has completely performed his side of the contract; the dissolution is the act of the plaintiff, the defendant's letter not amounting to a dissolution; but if that were otherwise, the court is bound to look at the whole state of circumstances which preceded the dissolution, and it was the plaintiff's conduct which occasioned it. In *Akhurst* v. *Jackson*, 1 Swanst. 85, the partnership was terminated by the bankruptcy of the partner who had received the premium, but the Court refused any return; and see *Lee* v. *Page*, 9 W. R. 754, 7 Jur. N. S 769. They also referred to *Airey* v. *Borham*, 29 Beav. 622; *Bullock* v. *Crockett*, 3 Giff. 507; and Lindley on Partnership, 2nd Ed. i. 79.

Kay, *Q. C.*, in reply.

March 11.—The judgment of the Court was delivered by—

Lord Cairns, L.C.* (after stating the facts):—This case belongs to a class which the Court is often called on to decide. In *Akhurst* v. *Jackson*, 1 Swanst. 85; *Freeland* v. *Stansfield*, 2 W R. 575, 2 Sm. & Giff. 479; *Bury* v. *Allen*, 1 Coll. 589; *Astle* v. *Wright*, 23 Beav. 81; *Lee* v. *Page*, 9 W R. 754, 7 Jur. N. S. 769, the principles which guide the Court in questions as to the return of premiums have been laid down. The Court will not suffer a partner who has committed a breach of the agreement to take advantage of his own breach and retain a premium paid to him, though on the other hand, if the party who had paid the premium were himself the faulty person, no return of premium would be decreed. In this case there was neither bankruptcy nor an agreement to dissolve. The authority of the cases is not disputed, but it is said that the partnership was dissolved through the

* This case was argued before the Lords Justices (Lord Cairns and Sir C. J. Selwyn) on Feb. 21 and 22, when judgment was reserved. Subsequently to this Lord Cairns received the Great Seal, and on March 11 delivered the judgment of himself and Lord Justice Selwyn.

acts of the plaintiff, his misconduct and the filing of his bill. But when we come to consider the nature of such a partnership as this, it is immaterial by whom the bill was first filed. The charge of negligence made by the defendant against the plaintiff is not proved; the evidence in support of it is weak and is answered by the evidence of the plaintiff; the case is thus narrowed to the charge of incompetence. Now, the defendant had ample opportunity of knowing what the plaintiff's capacity was; he must be taken to have known the kind of person he was treating with, and took higher terms in consequence. The decision might have been otherwise had there been fraudulent conduct or wilful neglect. [His Lordship cited the judgment of Lord Cottenham in *Hirst* v *Tolson*, 2 M. & G. 134.]

Upon the evidence, and considering the defendant's means of knowledge, we must take it that he was well aware what the plaintiff would be to him, and accepted this sum in compensation. The inconvenience has turned out greater than he thought it would be. A state of circumstances having arisen which renders it impossible for the partnership to continue, the result is that the defendant has received the £800 in consideration of the inconvenience which he would have to undergo, and now he is relieved from it.

The plaintiff must have so much of his £800 returned as bears to the whole sum the same proportion that the unexpired term of the partnership bears to the whole term. There will be no costs of the appeal, but the deposit will be returned.

Viscountess Gort v. Clark.

Light and air—Noise and vibration—Mandatory injunction—Damages.

Where the injury sought to be restrained has been completed before the filing of the bill, and the plaintiff has in the first instance, demanded damages, the Court will not grant a mandatory injunction, even where the injury is substantial, but will direct an inquiry as to damages.

The noise and vibration occassioned by a steam engine and circular saw considered an annoyance amounting to a nuisance, in respect of which an inquiry as to damages was granted.

Durell v. *Pritchard*, 14 W. R. 212, L. R. 1 Ch. 244, considered.

Decree of Stuart, V. C., affirmed.

This was an appeal from a decision of the Vice-Chancellor Stuart. The plaintiff was owner of a row of small tenements in Grosse-street Rathbone-place, which were let on lease to tenants, who sublet them in lodgings to persons of the working classes. Up to the month of August, 1864, at the back of the houses, fourteen feet from them only, was the back wall of a range of ancient stables in Black-Horse Yard, twenty-six feet in height. The defendant in that month, acquired the site of the stables, and began to erect thereon a factory, with an external wall fifty-six feet high, which was built up to its full height in the month of December, 1864, and the factory was completed and used soon after. On the 10th of January the agent of the plaintiff, who had hitherto not complained, wrote to the defendant, and complained that the factory wall interfered seriously with the access of light and air to the plaintiff's houses, and on the 26th of January wrote again, demanding £800 as compensation, and requiring in the alternative that the damage should be assessed by a surveyor. The defendant in reply, offered to purchase the freehold at a fair price, or to take a long lease of the premises; but his offer was declined, and a mandatory injunction threatened. The bill was filed in April, 1865, praying that the defendant might be restrained from erecting a wall higher than any wall which had existed on the site during the last twenty years, or raising any wall, by which the access of light and air to the back of the house might be impeded, and that the defendant might be ordered to reduce any wall already built by him to a height not greater than the original height of the stable wall, with an alternative prayer for an inquiry as to damages sustaind by the plaintiff. The plaintiff did not move for an injunction, but after answer amended her bill, and charged the existance of a nuisance, occassioned by the noise and vibration caused by a steam-engine and circular saw, which were at work in the factory from morning to night, and the smell of paint, used in painting the "self-coiling revolving shutters," of which the defendant was maker and patentee; in respect of which she prayed for an injunction or an inquiry as to damages.

The Vice-Chancellor declined to grant the injunction, but directed an inquiry as to damages, in respect both of the loss of light and air, and of the annoyance caused by the noise and vibration. From this decision the defendant appealed.

Bacon, Q. C., and *Bevir*, for the appellant—We admit that the erection, to some extent, does interfere with the plaintiff's light and air, but her claim is an exaggerated one, and is not put forward in such a shape as to entitle her to relief in this court. She has herself made it a question of damages only, and this is a mere bill for £800, which ought to be dismissed, without prejudice to her right to bring an action. Delay is also fatal to her claim. She has stood by and allowed us to lay out £4.000, and it was too late in April, 1865, to ask for a mandatory injunction when the building was practically finished in December, 1864. As the plaintiff is a reversioner, the damage done to her is inappreciable, and the Court will not interfere on her behalf, when the result would be the ruin of our trade. They referred to *Clarke* v. *Clark*, 14 W. R. 115, L. R 1 Ch. 16; *Durell* v. *Pritchard*, 14 W. R. 212, L. R 1 Ch 244; *Currier's Company* v. *Corbett*, 13 W. R 1056; *Robson* v. *Wittingham*, 14 W. R. 291, L. R. 1 Ch 442.

Greene, Q C., and *Walford*, for the respondent, were not called upon.

Wood, L. J —The strongest point in this case is, that the demand of the plaintiff was in the first instance shaped in the way of damages As regards the actual state of things in the present case, the question whether injury is or is not done to the plaintiff in cases of this description has been fully considered in *Clarke* v. *Clark*. *Durell* v. *Pritchard* (*ubi sup.*) There is a wall of fifty-six feet in height, erected by the defendant in substitution for a wall of twenty-six feet, and at a distance of fourteen feet only, upon the average, from the plaintiff's back windows. There is no doubt that the light and air have been considerably diminished: at the same time, as is generally the case, some compensation is given. There is a recess in one part of the wall,

and an open space left in another part, but what guarantee has the plaintiff for the continuance of such accomodation? This accomodation, therefore, on which the defendant has laid some stress in his evidence, cannot be taken into account in estimating the injury sustained. I certainly am inclined to think that Lord Cranworth, L. C., carried a little too far the principle laid down by him in *Yates* v. *Jack*, 14 W. R. 618, L. R. 1 Ch. 295, that the owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously to the interruption sought to be restrained; but that is needless to be considered here, as in the present case there was an absolute interference with the plaintiff's light. That being so, there is no question but that the plaintiff might have filed her bill, and moved for an injunction while the factory was in course of erection. Now the factory was completed for all practical purposes in December, but the plaintiff's agent first complained on the 10th of January. The remarks of Sir G. Turner, L. J., in *Durell* v. *Pritchard*, as to the practice of the Court with respect to mandatory injunctions mean simply this—that the Court will not interfere to the extent of pulling down a building already finished, unless where very serious damage would otherwise ensue. Delay on the part of the plaintiff has been spoken of, but I think that a month was not a very long time for a reversioner like the plaintiff to become acquainted with what was going on and make up her mind to interfere. The case originally assumed the complexion of a mere question of damages; but £800 is a large sum, and the defendant did not choose to come in to such terms. It cannot, however, be said that the light and air enjoyed by another may be taken by any one with impunity on the condition of paying him damages for the deprivation, to be assessed possibly somewhat as claims of compensation are assessed under the Lands Clauses Act; although the plaintiff may all along have been willing enough to take damages, provided she could get the sum she demanded. The question as to noise and vibration rests on a different footing. The Court, in my opinion, has jurisdiction to direct an inquiry as to damages in this case. It is in evidence that a steam-engine and circular saw are in constant work from morning to night fourteen feet from the windows of one of the houses, and that must be an annoyance amounting to a nuisance, if *Soltau* v. *DeHeld*, 2 Sim. N. S. 150, be law. The decree of the Vice-Chancellor must be sustained, and the appeal dismissed.

Selwyn, L. J.—I am of the same opinion. The defendant has wholly failed to prove that the delay of the plaintiff in commencing proceedings to establish her right was such as to disentitle her to relief. With respect to the substantial injury which the evidence shows the plaintiff to have sustasned, the case of *Durell* v. *Pritchard*, at first sight, would seem to justify the Court in granting a mandatory injunction. *Robson* v. *Wittingham*, however, shows that that class of cases has been carried too far. I think, therefore, that the Vice-Chancellor was right in limiting the relief to an inquiry as to damages sustained by the plaintiff, and not granting a mandatory injunction. The case goes far beyond the principle laid down in *Clarke* v. *Clark*, inasmuch as it is clearly proved that the plaintiff has in the present case sustained substantial injury; and so I agree with the Lord Justice that the appeal must be dismissed.

SANDWICH ISLAND REPORTS.

SUPREME COURT.

The King v. Ahsee.

Suicide—Indictment—Attempt to commit murder.

By the Court.

Allen, Ch. J.—The indictment charges the defendant with an attempt to commit the offence of murder, by hanging himself by the neck; to which indictment a general demurrer is filed.

The Attorney-General alleges this act to be an offence against the statute of this kingdom, which declares murder to be the killing of any human being with malice aforethought, without authority, justification, or extenuation by law, and also against that statute (Penal Code, c. 45, s. 5) which declares the attempt to commit an offence punishable with death or imprisonment for life, as punishable by imprisonment at hard labor not more than ten years

The counsel for defence contends that the act charged is not an offence known to the law, and hence it becomes necessary to ascertain the true meaning of the crime of murder under our statute; and, to do this satisfactorily, it may be well to ascertain what is the generally received definition of the crime of murder.

It is defined by Lord Coke, in 3d Institute, 47, as homicide with malice aforethought, either expressed by the party or implied by law. Malice, he says, is prepensed when one compasseth to kill, wound, or beat another, and does it *sedato animo*. In East's Pleas of the Crown (c. 5, s. 2) murder is defined as the voluntary killing of any person, of malice prepense, or aforethought express or implied. The penal code, upon which this indictment is found, uses the word in substantially the same sense; and, if we take the context together, it is very evident that it refers to the killing of another, and not one's self; and when the word is used by text-writers or by courts, it is always used as meaning the killing of another. It is never applied to suicide. The word self-murder is sometimes used. By the statutes of Massachusetts, in the first section of the class of offences against the lives and persons of individuals, it is declared that every person who shall commit the crime of murder shall suffer the punishment of death for the same. This can not apply to the suicide, for he is already dead by his own hand; and hence the statute cannot have reference to one who commits self-murder. The construction put upon our code by the Attorney-General leads to the same difficulty. Those learned in the law, and who draft statutes, would never use the expression, that whoever shall commit the crime of suicide shall suffer death.

It is very evident that the ablest text-writers never use the word murder as synonymous with suicide or self-murder. Punishment may be inflicted on the one, but the other is beyond its

reach. The code is made for the purpose of punishing those who commit murder, and not those who are murdered.

The Attorney-General has cited the case of the *Commonwealth* v. *George Bowen* (13 Mass. 354). Chief Justice Parker charged the jury that, if one counsel another to commit suicide, and the other, by reason of the advice, kill himself, the adviser is guilty of murder as principal. Admit this as sound law, it does not follow that a person who commits suicide is a murderer according to the provisions of the code or at common law. A contrary opinion is expressed by Chief Baron Alderson, in the case of *Regina* v. *Leddington* (9 Carrington & Payne, 79), in his charge to the jury. He says to them that they have no right to inquire into this charge. It is a case of suicide, and the prisoner is charged with inciting it. It is a case we cannot try, and the prisoner must be acquitted.

No punishment by a human tribunal can be inflicted on the self-murderer. Can a punishment, then, be inflicted on one who attempts to commit the act? The court has been unable to find in any penal statute any provision against an attempt to commit self-murder, and for the very reason that he who commits the act is his own executioner; and this is the first indictment we have ever heard of, charging the attempt to commit suicide as an attempt to commit murder, unless there is an analogy in the case of the *Commonwealth* v. *Bowen*, above stated. It is very evident that this indictment cannot be sustained by any provision of the criminal code of this kingdom, and we are not aware of any code against which it is an offence. That it is a wicked and highly immoral act is true; but the wisdom of legislative bodies has never deemed it wise to make a provision to apply to the act charged against the defendant, and we are of opinion that we should be slow to give an entirely new construction to the code concerning murder, and to impose a punishment never contemplated, and of the wisdom of which the framers of the law have not as yet expressed a favorable opinion,

Our statutes, the Attorney General contends, should be construed in reference to the statutes of other countries and to the common law. So far as these statutes and the common law can impart any knowledge of the terms used, it is a sound suggestion; but it would not be contended that it was the duty of the court to modify a statute to make it similar in its provisions to any other. Every statute must have the force of its clearly defined terms. We find, however, no statute of any country, nor any provision of the common law, which will sustain this indictment.

The demurrer is sustained, and the indictment quashed. —*Hawaiian Gazette.*

GENERAL CORRESPONDENCE.

Discussion of Judicial decisions—Points reserved by County Judge.

To the Editor of the Law Journal.

Dear Sir,—Permit us, through the columns of your Journal, to place before the profession the ruling of the Judge of the County Court of the County of Ontario, in a certain cause tried before him at the last sittings of the said Court. This is done with all due deference to the learned Judge, and with the hope that you or some other member of the profession may attack or justify his conduct.

The action was brought on a promissory note, and was originally commenced in the Court of Queen's Bench; but by an order of the Hon. Mr. Justice Morrison, it was brought down to be tried at the last sittings of the said County Court, under 23 Vict., cap. 42, sec. 4.

The action was against a company, and two other defendants, individually. The company and one of the other two defendants appeared by the same attorney, but the other defendant did not appear, against whom, consequently, judgment was signed by default. The declaration was in the usual form against those who had appeared, and contained a suggestion that judgment by default had been signed and obtained against him who had not appeared to the writ.

The only plea pleaded to this declaration was simply that of *payment*, upon which the plaintiffs joined issue in the usual way. When the case came on for trial the defendants' attorney appeared in person and made the following objections: firstly, that the record was insufficient, because a *copy* of the Judge's order directing the case to be tried at the County Court, instead of the order itself, ought to have been attached thereto; and, secondly, that the declaration disclosed no cause of action against one of the defendants, inasmuch as the note, upon which the suit was brought, was signed by him as Managing Director of the said Company.

In answer to the first objection, it was strongly urged by the plaintiffs' counsel, that the statute above referred to expressly provides that the order itself, *and not a copy thereof*, shall be annexed to the record; and to the second, that the defendants' attorney was estopped from raising such an objection, inasmuch as the only plea was that of *payment;* that if the record were not sufficient, advantage ought to have been taken of the defect before that stage of the proceedings; that the plea of *payment* admitted the sufficiency of the record, both in form and substance; and that, as the objections were merely for time, the learned judge ought not to defeat the very

object of the statute, as well as of the order to try the case at the County Court.

However, from some motive or other, the learned Judge directed the jury to find for the plaintiffs, but reserved leave to the defendants (who had appeared) to move against the verdict upon the points above, and endorsed the record as follows: "I hereby certify that this cause is one which, in my opinion, should stand for motion in the Court of Queen's Bench."

This, of course, as was contended by the plaintiffs' counsel, defeated the object of the order; and though the Court of Queen's Bench saw fit to grant the order, that time might be saved, still his Honor took it upon himself to throw the plaintiffs over until Michaelmas Term next, that being the Term of the Superior Courts next following the date of the certificate endorsed on the record. This ruling of his Honor was somewhat difficult to understand. However, it ought, perhaps, not to be inferred that he acted contrary to what he thought *might be right*; but it is certainly to be deeply regretted that, when a statute provides a method by which claims of this description can be more speedily recovered (and in a case like this, where time is of the greatest importance) there is not some method of testing the validity of the ruling of a Judge below, without the necessity of waiting till the fifth day of the following term of the Courts above. If defendants are entitled, as of course, to except to declarations in cases like this, the statute would be useless—its object entirely defeated. It was passed, no doubt, to cover cases exactly like the present, where a defence is made simply for time.

And looking from the most favorable standpoint for the defendants,—supposing that the declaration did not disclose a sufficient cause of action against one defendant; that it was insufficient, *i. e.*, either as disclosing a case insufficient on the merits, or as framed in violation of any of the rules of pleading, was not that defendant estopped from raising any objection which might, and ought to have been raised by a demurrer, when he had, in fact, selected the course of going to trial, of placing himself upon the country, upon the issue *payment or no payment*?

Please give an opinion on the subject, and oblige, Yours very truly,

Armour & Lowe.

[We confess that we are unable to see any ground for the learned Judge reserving the points alluded to above, on the facts there set forth. It would, however, be unfair to discuss the subject at length upon an *ex parte* statement, and it would be very improper to countenance any insinuation as to motives. As an abstract question, suggested by a perusal of this letter, it may be questioned whether a full, temperate and liberal discussion of the rulings of Judges would not be, in the long run, as beneficial to the judges themselves as it would to the profession. Such is the practice in England, though less so here, for reasons which it is not necessary to discuss; and though it would not be seemly for a Judge to enter the arena, he would not want a champion if his decision contained but the smallest foundation whereon to build an argument.

This is a matter which is capable of being much enlarged upon. Our present observations are drawn out by considering the difficulties to which lawyers are often subjected (without offering any opinion as to the legality of the decision above complained of) by the want of knowledge or carelessness of those who hold positions which give a propriety or weight and importance to decisions which are occasionally intrinsically worthless.—Eds. L. J.]

Law Reform.

To the Editors of the Law Journal.

Sir,—The Act respecting Mortgages and Sales of Personal Property unaccompanied by change of possession is in its present scope insufficient for the protection of Her Majesty's leiges.

The registration of every claim to personal property is necessary for the protection of the public in view of the fact that the holder of moveables is always presumed to be the owner. Anything calculated to rebut this presumption should be as notorious as the fact of possession—at least as far as it is possible to make it so.

It is certainly to the credit of the profession that pleading practitioners are more acute than legislators. To secure a claim, without sacrifice of the debtor's goods, it is comparatively easy to have a quiet Sheriffs' sale, to the creditor. The thing can be managed very pleasantly and your client is safely secured Furniture, pianos and the like can be leased nom-

inally, though really sold. There are many arguments valid to confirm the legality and morality of these transactions. But the worst of it is that when a claim is put in for collection, judgment obtained, and execution issued, up starts a claimant whose existence you had not dreamed of and of whose claim it was therefore impossible to acquire any knowledge.

Give honest lawyers fair play, and they will not be harassed by clients who demur to pay costs for a worthless judgment. If the registered claim is sanctioned by the execution of due "legal solemnities" the client will be informed that the case is doubtful or hopeless, and there will be no ground for grumbling.

Yours, &c.

An Attorney.

July 6, 1868.

Insolvency—Effect of discharge—Schedule of debts—Official assignee.

To the Editors of the Canada Law Journal.

I notice several letters from "Scarboro," and one from "Quinté." It seems evident from the cases cited by "Scarboro," and particularly from the judgment *McKay et al.* vs. *Goodson*, reported in No. 5 Vol. 27 Queen's Bench, that unless the debt is mentioned in the Schedule of liabilities, a discharge of the Insolvent will not be a discharge of the debt. The practice in these counties, in some cases, has been to make an Assignment without any Schedule of liabilities at all. "Scarboro" need not suppose that this has been done through the advice of the Official Assignee, (though he may by education be qualified to give advice on the subject) but lawyers, acting to the least of their judgment under the decision of Judge Draper in the case of *Hingston* vs. *Campbell* 2 U. C. L. J., N. S. 299. Draper, C. J., there says: "a copy of the list of creditors produced at first meeting of creditors need not be appended to the assignment." Let us look practically at the matter—an insolvent makes an assignment to an official assignee under Act of 1865 and C. J. Draper's decision without appending a list of his creditors; he waits for a year, and gets a discharge from all his debts, mentioned and set forth in the statement of of his affairs annexed to the deed of assignment, which, according to Judge Morrison, discharges him from nothing. Either C. J. Draper's decision is wrong, or, to give effect to both decisions, we must agree that a man who wishes to get a consent of his creditors to his discharge must have a schedule of liabilities, while a man who waits for a year may get a discharge without any schedule at all. The Judges seem to be as uncertain as the law itself.

I quite agree with "Scarboro" that the Act of 1864, although the intentions of the framer were good, seems lamentably deficient, and particularly in matters of practice, such as in appeal, taxation of costs, &c., but we must remember that the framer of the bill was a Lower Canadian Lawyer, and could not be expected to *know* the practice in Upper Canada. I also agree with "Quinte," that, as a general rule, assignees are not to blame. But *Ex parte Alexander*, 1 Deacon & Chitty, 514, says that "an Official Assignee is an officer purely ministerial,; he is debarred by his position from taking either the side of the creditor or that of the insolvent. As a consequence, he cannot stop the application for discharge, or appear to oppose it, neither, as assignee, should he apply for it."

St. Lawrence.

Brockville, July 8th, 1868.

CHANCERY AUTUMN CIRCUITS, 1868.

The Hon. the Chancellor.

Toronto	Tuesday	Sept.	1.

Eastern Circuit.

The Hon. the Chancellor.

Brockville	Friday	Sept.	18.
Cornwall	Monday	Sept.	21.
Ottawa	Tuesday	Sept.	29.
Peterboro'	Monday	Oct.	5.
Lindsay	Thursday	Oct.	8.
Kingston	Tuesday	Oct.	13.
Belleville	Monday	Oct.	19.

Home Circuit.

The Hon. Vice-Chancellor Spragge.

Owen Sound	Tuesday	Sept.	15.
Barrie	Monday	Sept.	21.
Brantford	Tuesday	Oct.	27.
St. Catharines	Friday	Oct.	30.
Guelph	Wednesday	Nov.	4.
Hamilton	Tuesday	Nov.	10.
Cobourg	Thursday	Nov.	19.
Whitby	Friday	Nov.	27.

Western Circuit.

The Hon. Vice-Chancellor Mowat.

Simcoe	Tuesday	Sept,	29.
Woodstock	Friday	Oct.	2.
Goderich	Tuesday	Oct.	6.
Stratford	Monday	Oct.	12.
Sarnia	Thursday	Oct.	15.
Sandwich	Monday	Oct.	19.
Chatham	Thursday	Oct.	22.
London	Tuesday	Oct	27.

AUTUMN CIRCUITS, 1868.

Eastern Circuit.

The Hon. the Chief Justice of the Common Pleas.

Ottawa	Wednesday	Sept.	2.
L'Orginal	Wednesday	Sept.	16.
Perth	Monday	Sept.	21.
Pembroke	Friday	Sept.	25.
Brockville	Wednesday	Sept.	30.
Cornwall	Wednesday	Oct.	14.
Kingston	Wednesday	Oct.	21.

Midland Circuit.

The Hon. Mr. Justice Hagarty.

Belleville	Wednesday	Sept.	30.
Picton	Monday	Oct.	12.
Napanee	Thursday	Oct.	15.
Cobourg	Tuesday	Oct.	20.
Whitby	Tuesday	Oct.	27.
Peterborough	Monday	Nov.	2.
Lindsay	Friday	Nov.	6.

Niagara Circuit.

The Hon. Mr. Justice J. Wilson.

Owen Sound	Tuesday	Sept.	22.
Barrie	Tuesday	Sept.	29.
Milton	Tuesday	Oct.	6.
Hamilton	Monday	Oct.	19.
St. Catharines	Thursday	Nov.	5.
Welland	Wednesday	Nov.	11.

Oxford Circuit.

The Hon. Mr. Justice Morrison.

Cayuga	Thursday	Sept.	10.
Simcoe	Tuesday	Sept.	15.
Woodstock	Tuesday	Sept.	29.
Stratford	Tuesday	Oct.	6.
Brantford	Tuesday	Oct.	13.
Guelph	Thursday	Oct.	29.
Berlin	Wednesday	Nov.	4.

Western Circuit.

The Hon. Mr. Justice A. Wilson.

Walkerton	Wednesday	Sept.	16.
Goderich	Tuesday	Sept.	22.
Sarnia	Wednesday	Sept.	30.
London	Monday	Oct.	5.
St. Thomas	Tuesday	Oct.	27.
Chatham	Tuesday	Nov.	3.
Sandwich	Tuesday	Nov.	10.

Home Circuit.

The Hon. the Chief Justice of Ontario.

County of Peel	Thursday	Sept.	24.
City of Toronto	Tuesday	Oct.	6.
County of York	Thursday	Oct.	15.

REVIEWS.

The Principles of Equity; intended for the use of Students and the Profession. By Edmund Henry Turner Snell, of the Middle Temple, Barrister-at-Law. London: Stevens & Haynes, Law Booksellers and Publishers, 11 Bell Yard, Temple Bar, 1868.

We have to thank the publishers for advance sheets of this valuable work, and for a complete copy lately supplied to us. We have had the work before us for a considerable time, intending to give it such a review as its worth demands. Our delay in reviewing it has arisen in great part from our desire to do it justice. We cannot now say too much in praise of it. It is one of the most readable and most instructive law treatises that has lately been issued from the press.

While the author has furnished a work which, considering his simplicity and clearness of diction, is all that a student can desire; his exposition of principles, illustrated by the most recently decided cases, makes his book a valuable text book for members of the profession engaged in active practice. His introductory chapter on equity is an admirable disquisition on the nature and origin of that branch of jurisprudence. In a few words, he shows that as the common law courts fell short of and were incapable of meeting the growing legal wants of society, a fresh tribunal of necessity arose, and that is the origin of Courts of Equity as distinguished from Courts of Law. But at the same time he shows that courts of equity are now bound as completely as courts of law by fixed rules.

The author, having made a brief comparison of courts of equity with courts of common law, classifies equity in relation to common law, as having a jurisdiction exclusive, concurrent or auxiliary. Under the head exclusive jurisdiction, he treats in a very able manner of trusts generally, express private trusts, express or charitable trusts, implied trusts, constructive trusts, trustees and executors, *donationes mortis causâ*, legacies, conversion, reconversion, election, performance, satisfaction, administration, marshalling, assets, legal mortgages, equitable mortgages, mortgages and pledges of personalty, penalties and forfeitures, and liens. Under the head of concurrent jurisdiction, he treats in like manner of accident, mistake, actual fraud, constructive fraud, suretyship, partnership, account, set off and appropriation of payments, specific performance, injunction and interpleader. Under the head of auxiliary or specially remedial jurisdiction, he treats of discovery, bills to perpetuate testimony, bills *quia timet* and bills of peace, cancelling and delivery up of documents, bills to establish wills, *ne exeat regno*. Besides, there is a part of his work which treats of persons under disability, such as infants, persons of unsound mind, married women (their separate estate, pin money, paraphernalia), equity to a settlement, settlements in derogation of marital rights.

All these are as it were so many complete and entertaining essays on the different branches of the law to which they appertain. The references to the most recent cases, by way of illustration as he proceeds, give the book a reliability that adds greatly to its intrinsic value.

There is a chapter in which the author briefly and succinctly treats of the following

legal maxims of equity, stripped of their usual Latin habilaments:—Equity will not suffer a wrong without a remedy; equity follows the law; where there are equal equities, the first in time shall prevail; where there is equal equity, the law must prevail; he who seeks equity must do equity; he who comes into equity must come with clean hands; equity aids the vigilant, not the indolent; equity is equity; equity looks to the intent rather than the form; equity looks at that as done which ought to have been done; equity imputes an intention to fulfil an obligation. Each maxim is shortly explained and illustrated by a leading case, and the whole comprised within twenty-seven pages.

The author explains in his preface that his work is the result of notes made by him in the course of his studies for the bar, not only from his own private reading but from the lectures of an able and distinguished lecturer on equity jurisprudence, Mr. Birbeck. Certainly Mr. Snell has "improved the occasion," and acquitted himself well. We must bespeak for him that patronage which his labours so justly merit. His *début* as an author has been most successful. We cannot speak too highly of this his first effort, and feel confident that all who may read it, as we have done, will think as well of it as we now do. Its utility as a work of reference is much enhanced by the addition of a very full and carefully-compiled index.

The book has been adopted by the Law Society here as one of its standard text books.

The type, paper, and general get-up of the work, so far as mechanical execution is concerned, is first class, and such as we had a right to expect from the standing and well-deserved popularity of the publishers, Messrs. Stevens & Haynes. The book may be ordered through Mr. Adams, law bookseller of Toronto, who is their agent in this province.

APPOINTMENTS TO OFFICE.

CANADA GAZETTE.

COUNTY COURT JUDGES.

WILLIAM MERCER WILSON, of Osgoode Hall, and of the Town of Simcoe, in the County of Norfolk, Esquire, Barrister-at-law, to be Judge of the County Court, of said County, in the place and stead of William Salmon, late of same place, Esquire, deceased. (Gazetted 9th May, 1868.)

WILLIAM HORTON, of Osgoode Hall, and of the City of London in the County of Middlesex in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court for the County of Middlesex in the said Province. (Gazetted 5th June, 1868.)

DEPUTY MINISTER OF JUSTICE.

HEWITT BERNARD, of the City of Ottawa, Esquire, and of Osgoode Hall, Barrister-at-Law. (Gazetted 29th May, 1868.)

ONTARIO GAZETTE.

ATTORNEY GENERAL FOR ONTARIO.

The Honorable JOHN SANDFIELD MACDONALD. (Gazetted 16th July, 1867.)

COMMISSIONER OF PUBLIC WORKS.

The Honorable JOHN CARLING, for the Province of Ontario. (Gazetted 16th July, 1867.)

COMMISSIONER OF CROWN LANDS.

The Honorable STEPHEN RICHARDS for the Province of Ontario. (Gazetted 16th July, 1867.)

PROVINCIAL SECRETARY.

The Honorable MATTHEW CROOKS CAMERON, for the Province of Ontario. (Gazetted 20th July, 1867.)

PROVINCIAL TREASURER.

The Honorable EDMUND BURKE WOOD, for the Province of Ontario. (Gazetted 20th July, 1867.)

ASSISTANT SECRETARY.

THOMAS CHARLES PATTESON, of the City of Toronto, Esquire, Barrister-at-Law, to be Assistant Secretary and Deputy Registrar for the Province of Ontario; such appointment to date from the 1st day of October, A.D., 1867. (Gazetted 7th March, 1868.)

CLERK OF THE CROWN.

ROBERT GLADSTONE DALTON, of Osgoode Hall, Esquire, Barrister-at-law, to be Clerk of the Crown and Pleas, in the Court of Queen's Bench, in the room and stead of Lawrence Heyden, Esquire, deceased. (Gazetted 27th June, 1868.)

DEPUTY CLERK OF THE CROWN.

SAMUEL REYNOLDS, Junior, Esquire, of the Town of Prescott, to be Deputy Clerk of the Crown and Clerk of the County Court for the United Counties of Leeds and Grenville in the room and place of W. H. Campbell, resigned. (Gazetted March 7th, 1868.)

WALTER RUBIDGE, of Brantford, Esquire, to be Deputy Clerk of the Crown, and Clerk of the County Court, for the County of Brant, in the room and stead of John Harvey Goodson, Esquire, superseded. (Gazetted 6th June, 1868.)

COUNTY ATTORNEYS AND CLERKS OF THE PEACE.

JULIUS POUSSETT BUCKE, of the City of Ottawa, Esquire, to be County Attorney for the County of Lambton, in the room of Timothy Blair Pardee, resigned.

HENRY A. HARDY, of the City of Toronto, Esquire, Barrister-at-law, to be County Attorney and Clerk of the Peace in and for the County of Norfolk, in the room and stead of William Mercer Wilson, Esquire, appointed Judge of the County Court of the County of Norfolk;

WILLIAM DOUGLASS, of Chatham, Esquire, Barrister-at-law, to be County Attorney and Clerk of the Peace, in and for the County of Kent, in the room and stead of Alexander D. McLean, Esquire, deceased. (Gazetted, 6th June, 1868.)

WARD HAMILTON BOWLBY, Esquire, LL. B., of Osgoode Hall, Barrister-at-Law, for the County of Waterloo, in the room and stead of THOMAS MILLER, Esquire, resigned. (Appointed 24th December, 1867.)

CLERK OF THE DISTRICT COURT.

HENRY PILGRIM, Esquire, Clerk of the District Court for the District of Algoma, in the place and stead of SEPTIMUS RUDYERD PRINCE, deceased. (Appointed 22nd October, 1867.)

POLICE MAGISTRATE.

DONALD BETHUNE, Esquire, Q. C., Barrister-at-Law, for the Town of Port Hope. (Appointed 30th January, 1868.)

STIPENDIARY MAGISTRATE.

CHARLES WESTLEY LOUNT, of the City of Toronto, Esquire, Barrister-at-law, to be Stipendary Magistrate, for the Territorial District of Muskoka. (Gazetted 14th March. 1868.)

INSPECTOR OF REGISTRY OFFICES.

The Honorable SIDNEY SMITH, of the Town of Peterboro, to be Inspector of Registry Offices in and for the Province of Ontario. (Gazetted 14th March, 1868.)

REGISTRARS.

CHARLES LINDSEY, Esquire, to be Registrar for the City of Toronto, in the room and stead of Samuel Sherwood, Esquire, deceased. (Appointed December 24, 1867.)

CHARLES WESTLEY LOUNT, of the Territorial District of Muskoka, Esquire, to be Registrar of said Territorial District. (Gazetted 11th April, 1868.)

NOTARIES PUBLIC FOR ONTARIO.

DUNCAN DUGALL, of the Town of Windsor, Esquire, Barrister-at-Law;

SOLOMON WHITE, of the Town of Windsor, Esquire, Barrister-at-Law;

Appointments to Office.

ISAAC H. PRICE, of the City of Kingston, Attorney-at-Law;

JAMES KIRKPATRICK KERR, of the City of Toronto, Esquire, Barrister-at-Law;

ROBERT WALKER SMITH, of the City of Toronto, Attorney-at-Law;

JOHN BUTTERFIELD, of the Town of L'Orignal, Attorney-at-Law;

JOHN KLEIN, of the Township of Carrick;

BENJAMIN FRANKLIN FITCH, of the Town of Brantford, Esquire, Barrister-at-Law;

JAMES F. MACKLEM, of the Village of Chippewa, Gentlemen;

FRANCIS ALEXANDER HALL, of the Town of Perth, Gentleman;

JAMES FLEMING, of the Town of Brampton, Esquire, Barrister-at-Law;

SAMUEL McCAMMON, of Gananoque;

JAMES HARSHAW FRASER, of the City of London;

RICHARD H. R. MUNRO, of the City of Hamilton;

JOHN EDWARD ROSE, of the City of Toronto;

ELIJAH WESTMAN SECORD, of the village of Madoc;

LOUIS BERNARD DOYLE, of the town of Goderich;

JOHN BURNHAM, of the Town of Peterborough, for the Province of Ontario.

HENRY PRESTON, of the Village of Clifton, Gentleman, and CHARLES TAIT SCOTT, of the Village of Wingham, Gentleman.

EDWARD STONEHOUSE, of the Village of Strathroy, Gentltman, Attorney-at-law.

HUBERT L. EBBELS, of Petrolia, Esquire, Barrister-at-law.

FREDERICK D. BARWICK, of the City of Toronto, Esquire, Barrister-at-law. (Gazetted 14th March, 1868.)

ALEX. S. CADENHEAD, of the Village of Fergus, Esquire. (Gazetted March 7, 1868.)

J. FLETCHER CROSS, of Fergus, Esquire, Barrister-at-law;

JOHN VANDAL HAM, of the Town of Whitby, Gentleman, and ROBERT COLIN SCATCHERD, of the Village of Strathroy, Esquire. (Gazetted 4th April, 1868.

ARTHUR S. HARDY, of the Town of Brantford, and DAVID HIRAM PRESTON, of the Town of Napanee, Esquires, Barristers-at-law. (Gazetted 18th April, 1868.

GEORGE TAILLOU, of the City of Ottawa, Esquire, Attorney-at-law; HENRY HAMILTON LOUKS, of the Town of Pembroke, Esquire, Barrister-at-law; and FRANCIS HOLMESTED, of the City of Toronto, Esquire, Attorney-at-law. (Gazetted 9th May, 1868.)

GEORGE KENNEDY, of the City of Ottawa, Esquire, Barrister-at-Law; THOMAS KENNEDY, of the City of Toronto, Gentleman, Attorney-at-law; DAVID CREASOR, of the Town of Owen Sound, Esquire, Barrister-at-law, and WILLIAM H. LOWE, of the Town of Bowmanville, Gentleman, Attorney-at-law. (Gazetted 6th June, 1868.)

WILLIAM ROBERTSON CHAMBERLAIN, of Napanee, Gentleman, Attorney-at-law. (Gazetted 13th June, 1868.)

JOHN WHITLEY, of the City of Toronto, Gentleman, Attorney-at-law. (Gazetted 20th June, 1868.)

ASSOCIATE CORONERS.

JOHN W. CORSON of the Town of Brampton, Esquire, M. D., for the County of Peel.

EDWARD PLAYTER, of the Township of King, Esquire, M. D., for the County of York.

J. D'EVELYN, of the Village of Woodbridge, Esquire, M. D., for the County of York.

WILLIAM JOHNSTON, of the Town of Brampton, Esquire, M. D.; JOHN GRANT, of the same place, Esquire, M. D.; and THOMAS GRAHAM PHILLIPS, of the Village of Grahamsville, Esquire, M. D., for the County of Peel.

CHARLES E. BONNELL, of the Village of Bobcaygeon, for the County of Victoria.

DONALD ROBERTSON, Esquire, of Queenstown, for the Town of Niagara. (Gazetted 7th March, 1868.)

GEORGE DICKINSON, of the Township of Russell Esquire, M.D.;

ROBERT A. ROE, of the Township of Clarence, Esquire, M.D., for the United Counties of Prescott and Russell;

JAMES FURGUSON, of the Township of Cumberland, Esquire, M.D., for the United Counties of Prescott.

T. F. CHAMBERLIN, of Morrisburgh, Esquire, M.D., for the United Counties of Stormont, Dundas and Glengarry;

JOHN MASSIE, of the Village of Colborne, Esquire, M.D. and AMOS E. FIFE, of the Village of Brighton, Esquire, M.D., for the United Counties of Northumberland and Durham;

SAMUEL RAE, of the Town of Whitby, Esquire, M.D., for the County of Ontario.

His Excellency has also been pleased to accept the resignation of GEORGE EDWARD BULL, of the Village of Stirling, for the County of Hastings.

DONALD McMILLAN, of Alexandria, Esquire, M.D., and SAMUEL CAMPBELL, of Notfield, Esquire, M.D., for the United Counties of Dundas, Stormont and Glengarry;

ROBERT TRACY, of the Village of Seaforth, Esquire, M.D., for the County of Huron;

J. S. W. WILLIAMS, of Oakville, Esquire, M.D., for the County of Holton. (Gazetted 7th March, 1868.)

NIVEN AGNEW, of the Township of Delaware, Esquire, M.D., for the County of Middlesex;

JOHN MANSON, of the Village of Iona, Esquire, M.D.; WILLIAM McGEACHY, of the Village of Fingal, Esquire, M.D.; and GEORGE W. LING, of the Village of Wallaceburg, Esquire, M.D., for the County of Elgin;

ROBERT HENRY PRESTON, of Newboro', Esquire, M.D., for the United Counties of Leeds and Grenville;

NEIL FLEMING, of the Township of Culross, Esquire, M.D., for the County of Bruce;

ROBERT RENFREW SMITH, of the Township of Lobo, Esquire, M.D., for the County of Middlesex.

JOHN WILTON KERR, of the Village of Ainleyville, Esquire. M.D., for the County of Huron. (Gazetted 14th March, 1868.)

JAMES TURNER MULLEN, M.D., of Tullamore, and SAMUEL ALLISON, M.D., of Caledon East, Esquire, for the County of Peel;

FREDERICK HENRY SMITH, of the Township of Kaladar, M.D., Esquire, for the United Counties of Simcoe and Addington;

JOHN CARNEY, of the District of Algoma, Esquire, M.D., for the said District. (Gazetted 28th March, 1868.)

JOSEPH JOHNSON, of the Township of Winchester, Esquire, M. D. for the United Counties of Stormont, Dundas and Glengarry.

ANDREW MOORE, of Kincardine Esquire, M.D., for the County of Bruce;

THOMAS WHITE, jur., of the City of Hamilton, for the City of Hamilton. (Gazetted 4th April, 1868.)

REGINALD HERWOOD, M.D., and JAMES W. DIGBY, M.D., Esquires, of the Town of Brantford, for the County of Brant. (Gazetted 11th April, 1868.

ROBINSON BRITTON PRICE, Esquire, for the United Counties of Lennox and Addington. (Gazetted 1st April, 1868.)

SAYERS S. HAGAR, of the Township of Wainfleet, Esquire, for the County of Welland. (Gazetted 30th April, 1868.)

GEORGE NEIMIER, of the Village of Neustadt, Esquire, M.D., for the County of Grey;

ROBERT WILLIAM HILLARY, of Aurora, Esquire, M.D. for the County of York;

CHARLES WESTLEY LOUNT, of the Village of Bracebridge, Esquire, for the Territorial District of Muskoka. Gazetted 9th May, 1868.)

WILLIAM LAW, of the Village of Duke Hill, Esquire, M.D., for the County of Middlesex. (Gazetted 16th May, 1868.)

HENRY WILLIAM DALTON, and ALEXANDER STEWART, of Albion, Esquires, M.D.; and J. KNIGHT RIDDELL, of Alton, Esquire, M.D., for the County of Peel;

CHARLES McKENNA, of Loretto; THOMAS TURNBULL, of Mono Centre; and JAMES HENRY, of Orangeville, Esquires, M.D., for the County of Simcoe;

DANIEL BEATTY, of the Village of Richmond, Esquire, M.D., for the County of Caledon. (Gazetted 6th June, 1868.)

THOMAS ARMSTRONG, Esquire, M.D., for the County of Ontario. (Gazetted 20th June, 1868.)

DIARY FOR AUGUST.

1. Sat. ..*Lammas.*
2. SUN..*8th Sunday after Trinity.*
9. SUN..*9th Sunday after Trinity.*
12. Wed..Last day for service for County Court.
14. Frid..Last day for Co. Clerks to certify County Rates to Municipalities in Counties.
16. SUN..*10th Sunday after Trinity.*
21. Frid..Long Vacation ends.
22. Sat. ..Declare for County Court.
23. SUN..*11th Sunday after Trinity.*
24. Mon..*St. Bartholomew.*
26. Wed..Appeals from Chancery Chambers.
30. SUN..*12th Sunday after Trinity.*
31. Mon..Last day for Notice of Trial for Co. Court. Last day for setting down for rehearing.

THE

Canada Law Journal.

AUGUST, 1868.

CHANGE OF VENUE.

The venue is an entry in the margin of the declaration, of the county wherein the action is to be tried, and from which the jurors are to be summoned to try it.

It is of two kinds, transitory and local: transitory, where the cause of action might be supposed to have happened anywhere, such as debt, detinue, slander, assault, and generally all matters relating to the person or personal property; local, where the cause of action could have happened in one county only, or is so made by statute, thus, trespass, *quare clausam fregit*, actions against magistrates, &c.

We propose to make some remarks as to change of venue in transitory actions.

The rule at common law was, that in a transitory action the plaintiff, being *dominus litis*, might lay the venue in whatever county he pleased; but this was found to create so much vexation, in consequence of plaintiffs laying venues at a great distance from the defendant's residence, that it was enacted by 2 Ric. 2, cap. 2, that the venue should be laid in the county where the cause of action arose.

The practice which sprung up after this statute was, to change the venue in a transitory action, on an *ex parte* application, before issue joined, upon a common affidavit that the cause of action, if any, arose in another county, and not in the county in which the venue was laid. Plaintiff's only course then was to bring back the venue to the county in which it was originally laid, upon an undertaking to give material evidence in that county. Defendant could, on special grounds, make an application, after issue joined, to change the venue.

Then came our Rule No. 19 (Har. C. L. P. A. 599), which provides that no venue shall, unless upon consent of parties, be changed without an order of the court or a judge, made after a rule to show cause, or judge's summons; but such order may nevertheless be made before issue joined, in those cases in which it could have been so made before this rule; and in all cases the venue may or may not be changed, according as it shall appear to the court or judge that the cause may be more conveniently and fitly tried in the county in which the cause of action arose, or that in which the venue has been laid.

This rule in no way takes away the right of a defendant to make the application on the common affidavit, but says that there must be a rule or a summons. The rule is simply prohibitory. It means that the order to change the venue shall not be a matter of course, but after a rule or summons to show cause. However simple and common the affidavit may be, if an order be made in pursuance of a rule or summons upon which the opposite party may be or has been heard, it is a special order within the meaning of the rule (per Maule, J., in *Begg* v. *Forbes et al*, 13 C.B. 614); the object being to obviate the necessity of resorting to the clumsy expedient of bringing back the venue upon an undertaking to give material evidence in the county where it was originally laid (per Maule, J., in *Clules* v. *Bradley*, 17 C. B. 608). The application may be made, as formerly, either before or after issue joined. But whether made before or after issue joined, it would be well for the party applying to state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shown If he rely on the fact that the cause of action arose in the county to which he desires to change the venue, he may be answered not merely by affidavits denying this fact, but showing that the cause may be more conveniently tried in the county where the venue is laid. (See *Smith* v. *O'Brien*, 26 L. J. Ex. 30; *Carruthers* v. *Dickey*, 2 U. C. L. J. 185; *Vance* v. *Wray*, 3 U. C. L. J. 69.) If the application be after issue joined, it must show that the issues joined may be more conveniently tried in the

county to which the party applying proposes to change the venue. Of course these affidavits are open to an answer by the other party. In all cases, the court or judge will decide, after hearing both sides, whether the venue is to remain, or be changed as prayed, or be laid in some third county, according to the discretion of the court or judge (per Pollock, C. B., in *De Rothschild* v. *Shelton*, 8 Ex. 503); and the court will in general refuse to review the exercise of the judge's discretion (*Scoble* v. *Henson*, 9 U. C. L. J. 131; *Begg* v. *Forbes*, 13 C. B. 614; *Cartwright* v. *Frost*, 3 H. & N. 278; *Schuster* v. *Wheelwright*, 8 C. B. N.S. 388; *Penhallow* v. *Mersey Dock Co.*, 29 L. J. Ex. 21.) Where a judge made an order to change the venue on a special affidavit showing a *prima facie* case, it was said that the proper course of the opposing party was, not to move to rescind the order, but to apply at Chambers on a counter-affidavit to bring back the venue. (*Brown* v. *Clifton*, 10 W. R. 86; see also *Cull* v. *The Hull Dock Co.*, 11 W. R. 284.)

If defendant be under terms to take short notice of trial, he cannot move on the common affidavit, but may do so on a special affidavit. (*Clulee* v. *Bradley*, 13 C. B. 604; *Jackson* v. *Kidd*, 8 C. B. N. S. 354.) In *Helliwell* v. *Hobson*, 8 C. B. N. S. 761, it was held that the court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there be a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue; and in *Durie* v. *Hapwood*, 7 C. B. N. S. 837, Willes, J., referring to that case, is reported to have said, "When the question arises again, perhaps that case may require some consideration." But the rule laid down in *Helliwell* v. *Hobson*, does not appear to have been successfully impeached in any subsequent case. (See *Moore* v. *Boyd*, 1 U. C. L. J. N. S. 184.) If it be made to appear to the satisfaction of the court or judge that there will be a great waste of costs in the trial of the cause at the place where the venue is laid, and much saving of costs at the place where it is sought to change the venue, the change will in general be made. (*Ib.*; see also *Channon* v. *Parkhouse*, 13 C. B. N.S. 341.) But twenty-five witnesses and a horse on one side, against ten witnesses on the other, was held not to be such "a preponderance" as to induce the court to bring back the venue from the place where the cause of action, if any, arose. (*Blackman* v. *Barnton*, 15 C.B.N.S.434.)

It is not a sufficient cause for change of venue, that either party has retained the most eminent counsel on the circuit, unless done oppressively. (*Curtis* v. *Lewis*, 12 W.R. 951.) Nor is the fact that one of the parties to the suit is a member of Parliament, supposed to have considerable influence in the county where the venue is laid, any ground for change of venue. (*Salter* v. *McLeod*, 10 U.C. L.J. 76.)

The occurrence of an accident preventing the trial of the cause in the county where the venue was laid, coupled with other special circumstances, was held sufficient reason for a change of venue at the instance of plaintiff (*McDonell* v. *Provincial Insurance Co.*, 5 U.C. L. J. 186), especially where shown that the recovery of the debt would be endangered by delay (*Mercer* v. *Vought et al*, 4 U. C. L. J., 47; *Bleakley* v. *Eastin*, 9 U. C. L. J. 23; *Lucas* v. *Taylor*, 4 U. C. Prac. R. 99.)

The change may be ordered on special terms as to payment of witnesses, &c., either on application of plaintiff or defendant. (See *Municipal Council of Ontario* v. *Cumberland*, 8 U. C. L. J. 11; *Ham et ux.* v. *Lasher*, 10 U. C. L. J. 74.)

It has been held that the Crown, in revenue cases, has the right to lay the venue in any county it sees fit, and that no change can be made without the consent of the Attorney-General. (*The Queen* v. *Shipman*, 6 U. C. L. J. 19; see also *Attorney-General* v. *Crossman*, 1 L. R. Ex. 381.)

JUDICIAL FORM OF EXPRESSION.

There is much sound sense in the following observations of the late Chief Justice of the Supreme Court of the State of Georgia—delivered by him on refusing an application for a new trial made on behalf of a man who had been convicted of murder:—

"All the evidence shews a vicious and depraved propensity to take human life—for the preservation of which human laws are enacted."

"In this age of recklessness and terrible demoralization of men—if men sow the wind they cannot expect courts and juries to interpose and prevent them from reaping the whirlwind—they must eat of the fruit of their own doings. It has been said heretofore that, few cases of murder in the first degree, such as poisoning and private assassination were committed by our people. But

if passion without sufficient provocation is to excuse men from the crime and guilt of murder, then is human life cheap indeed—of no more value than the sparrow's."

"I have lost faith very much in punishment as a means of amending the offender himself. Its reformatory effect is not much, I fear; still its punitive power must be felt; and while the glittering blade wielded by the strong arm of malice is mighty to destroy, still, *the small cord in the hands of the executioner of justice must be felt to be not less fatal and unerring.*" (*l*)

"This is an age of Cains and the voices of murdered Abels come up at every court crying aloud to the ministers of the law for vengeance. Let the stern response going out from the jury box and the bench be, who sheddeth man's blood without legal excuse or justification—*shall be hung by the neck till he is dead.*" (*ll*)

35th Georgia Reports, 169-170.

As a matter of taste—it would be a not agreeable surprise to hear from our Judges, similar forms of expression—however readily we might concur in the sentiments expressed.

SELECTIONS.

THE RIGHT TO BEGIN.

The question whether it is the plaintiff or the defendant that is entitled to begin, and, consequently, to reply, should evidence be called on the other side, is one of great practical importance. It is not, indeed, very creditable to the character of the tribunal provided by the common law of England for the decision of issues of fact that so much should depend upon the accident of having the last word with the jury. But so long as the public insists on having its lawsuits determined by men summoned for a day from the shop or the counting house, unaccustomed to analyse a complicated mass of evidence, and ready to be carried away by that view of the case which has been last presented to their minds with any degree of plausibility, so long will the right to begin be a privilege highly valued and eagerly contended for at Nisi Prius.

There seems to have prevailed at one time an impression that this was a point exclusively in the discretion of the judge who tried the cause, and not to be reviewed by the full court. Thus, in *Burrell* v. *Nicholson* 1 M. & R. 304, doubts were expressed whether a new trial could in any case be granted on account of a misdirection on this head. And it may be regarded as settled that a new trial will not be awarded *merely* on the ground that the unsuccessful party was deprived of his right to begin and to reply. But if it is more than a mere matter of form—if the evidence is doubtful and conflicting, and the case such that the fact of having the first and the last word with the jury might well be decisive of the issue, a new trial will be granted if the direction at Nisi Prius was erroneous: (*Ashby* v. *Bates*, 15 M. & W. 589; *Doe* v. *Brayne*, 5 C.B. 655.) "In some cases," we find it remarked by Pollock, C.B., in *Ashby* v. *Bates*, "the right to begin may be properly matter for the Judge's discretion, while there are others in which it is of the utmost importance that the suitor who, in point of practice, has a right to begin should exercise that right accordingly. It appears to me that in this case the plaintiffs were entitled to begin, but that, by a miscarriage at Nisi Prius, they were deprived of that right, and we think it possible that their case may have been injuriously or materially affected in consequence. We therefore think that there ought to be a new trial, in order that they may fully exercise that right." But should the court be of opinion that, from the nature of the case, it could be of little or no practical importance which party began and replied, or that, from the evidence adduced on behalf of the side for which the verdict was given, it is clear that the result would have been the same in any case, no new trial will be granted on the point of form: (*Edwards* v. *Mathews*, 11 Jur. 398; *Brandford* v *Freeman*, 5 Ex. 734.) The right to begin is important only in so far as it may affect the result, and unless the court is satisfied that an erroneous decision may have had that effect, it will not merely on this account again send the case down for trial.

What, then, is the rule for determining whether the plaintiff or the defendant should have the advantage of opening the case? The canon generally laid down in the books is that that party begins against whom the verdict must pass, should no evidence be adduced on either side. But this test is a very misleading one. Wherever the only plea on the record is one in confession and avoidance, the defendant would, on this view, be entitled to begin, since he has admitted a cause of action in the plaintiff, and must suffer a verdict, with at least nominal damages, should he fail to make out his plea in avoidance; whereas it is in comparatively few cases that the defendant can obtain this privilege by confining himself to affirmative pleas. It is more correct to say that the plaintiff will be entitled to begin if he has to adduce any evidence either in support of his case or as to the amount of damages before he can obtain the verdict which he desires, while, on the other hand, the defendant will have the first word if he has admitted the plaintiff's case and the amount of compensation to which he will be entitled should the defendant fail to establish his affirmative pleas. If merely nominal damages are claimed, or the damages are liquidated and appear in the body of the declaration, the defendant must begin, if his pleas are in confession and avoidance only; but if the plaintiff claims substantial damages, the amount of which will have to be proved, the

plaintiff begins, although the affirmative lies upon the defendant on the record. In other words, he begins who, in the absence of proof on either side, would fail in the action; for, where heavy damages were sought, a verdict for a mere nominal sum is a victory for the defendant. That this test is more accurate than that usually suggested will appear from an examination of the reported decisions.

In actions upon bills and promissory notes, or upon policies of life insurance, the amount which the plaintiff seeks to recover is liquidated and appears on the face of the declaration. If the defendant has not traversed any allegations therein contained, the plaintiff's case—and the amount of his claim in consequence of it—stand admitted upon the record; and upon this admission, without adducing any further evidence, the plaintiff would be entitled to a verdict for the sum really claimed by him, should the defendant fail to make good his pleas in avoidance. There is no doubt that, under such circumstances, the defendant is entitled to begin: (*Mills* v. *Barber*, 1 M. & W. 425; *Geach* v. *Ingall*, 14 M. & W. 95.) And even where in an action on a promissory note interest not made payable upon the face of the note was claimed, the only plea being one of coverture, the defendant was held entitled to begin, on the ground that a note of itself carries interest, and that the plaintiff's right to it appeared on the declaration as admitted on the record without any evidence: (*Cannam* v. *Farmer*, 3 Ex. 698.)

But the case is very different if the action, instead of being on a bill or on a policy of life insurance, is in tort, as for a trespass or libel, or on a policy of fire insurance, which, as distinguished from a life policy, is a contract of indemnity, or in the ordinary *indebitatus* counts, since in all these cases the plaintiff, even if his right of action stands admitted upon the record, will have to adduce evidence to show the amount to which he is entitled. The plea in confession and avoidance carries no admission of the sum to be awarded the plaintiff should the defence not be made good, since the amount mentioned at the foot of the declaration is merely nominal, and the affirmative lies upon the plaintiff on this point. In the absence of evidence on either side the plaintiff would fail in the action, in this sense, that he would get a verdict for merely nominal damages. At one time, however, the defendant was sometimes allowed to begin in such cases if the pleas were such as to throw the affirmative upon him. Thus, in *Cooper* v *Wakley* (1 M. & M. 248), an action for libel, the only plea being one in justification, Lord Tenterden, after consulting with two of his colleagues, ruled that the defendant should begin. This decision was, according to Lord Denman, universally felt in the Profession to be erroneous, and gave rise, some years afterwards, to a resolution of the Judges, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." (5 Q.B. 462). In accordance with this resolution was decided the case of *Carter* v. *Jones* (1 M. & R. 281), when the plaintiff was held entitled to begin in an action of libel, with no plea on the record but one of justification.

The applicability of the principle on which this resolution of the Judges rests to cases other than those which strictly fall within its terms, we propose to consider in our next number.—*Law Times*, July 11, 1868.

We drew attention last week to the principle determining the question whether it is the plaintiff or the defendant that is to have the first and the last word with the jury—a question which (as was remarked by Pollock, C. B. in *Ashby* v. *Bates*, 15 M. & W. 589), the increasing intelligence of juries may in time render of small importance, but which, as matters at present stand, is in a vast number of cases practically decisive of the issue. The ruling in *Cooper* v. *Wakley*, 1 M. & M. 248, that, even in such actions as those for libel or personal injuries, in which a great part of the evidence and of the speeches of counsel, whatever may be the pleas on the record, must have reference solely to the quantum of damages, the defendant might deprive his antagonist of the formidable advantage of opening the case by pleading only in avoidance and abstaining from the general issue, led to the resolution of the Judges reported by Lord Denman, 5 Q. B. 462. This resolution was in its terms confined to libel, slander, and injuries to the person, and, no doubt, it is precisely in cases of this description that it is of the greatest consequence to the plaintiff that he should retain his right to begin, although the affirmative issue lies on the defendant. In several Nisi Prius cases accordingly we find it laid down that, except in such actions as those mentioned in the resolution, the right to begin is with him upon whom the pleadings have cast the affirmative issue. In *Reeve* v. *Underhill*, 1 M. & R. 440, and in *Wootton* v. *Barton*, 1 M. & R. 518, it was held that in an action of covenant, though the damages are unascertained, the defendant is entitled to open the case if he has pleaded only in confession and avoidance. Tindal, C. J. remarked in the former of these cases that the new rule was never meant to apply under such circumstances; that hardly ever in actions for the breach of special agreements could the damages be said to be precisely ascertained; but that in such cases they were mere matter of calculation, and not liable to be increased by what the plaintiff could urge in aggravation, as in actions for libel or other malicious injuries. These decisions however, are entirely overruled by that of the full court in *Mercer* v. *Whall*, 5 Q. B. 447. It is there observed (pp. 456, and 467), that the sole reason for the fact that the judges confined the rule to injuries of a personal kind is, that it was only in such cases that a doctrine op-

posed to that embodied in their resolution had been laid down, and that its terms were framed merely with reference to the class of cases which had thus been brought under the consideration of those who drew it up. The principle, it was pointed out, on which the rule in question rests is, that if the plaintiff has anything to prove, either as to his case itself, or as to the amount of damages, he should begin, and this principle obviously applies to a host of cases of contract as well as of tort. Thus it was said by Patteson, J.: "I have always thought the general rule to be that, if on the defendants proof failing, the verdict might be given directly for the plaintiff, as would be the case where the damages were fixed, or merely nominal, the defendant should begin.". *Mercer* v. *Whall* was an action for breach of covenant in dismissing an apprentice; the plea alleged misconduct justifying the dismissal, and the plaintiff was allowto begin, on the ground that he went in for substantial damages, the amount of which he would have to prove. "The natural course would seem to be," it was said by Lord Denman, C. J., "that the plaintiff should bring his own cause of complaint before the court and jury in every case he has anything to prove, either as to the facts necessary for his obtaining a verdict, or as to the amount of damages to which he conceives the proof of such facts may entitle him." In actions of contract no less than of tort, the plaintiff who desires more than nominal damages may have to prove the amount to which he is entitled, even where it stands admitted on the record that he has a right of action. It is in tort, indeed, that the privilege of opening and replying is more particularly valuable, the amount of damages being left more to the discretion of the jury, which may account for the circumstance that the resolution so often quoted is confined to cases of this kind, but the reason on which the resolution rests is of much wider application.

The doctrines so clearly laid down in *Mercer* v. *Whall* are also exemplified in *Absalom* v. *Beaumont*, (1 M. & R. 441, note), an action upon a policy of fire insurance where, although the affirmative issue lay upon the defendants, the plaintiff began on the ground that he would have to prove the amount of compensation to which he was entitled under a policy which is a contract to indemnify. And the result is the same where the declaration is in the ordinary *indebitatus* counts the defendant, by a plea in avoidance which he fails to prove, admits that he is indebted to the plaintiff but not the amount of his indebtedness. The plaintiff will have to prove the value of the work done, or of the articles supplied, in order to get a more than nominal verdict, and so retains his right to begin: (*Morris* v. *Lotan*, 1 M. & R. 233; *Lacon* v. *Higgins*, 3 Starkie, 178.) In all these cases, it will be observed, the application of the test usually suggested, that he begins against whom in the absence of proof on either side the verdict must pass, would lead to the erroneous conclusion that the defendant is the party to begin.

The plaintiff is, of course, *primâ facie* the party who should open the case, and he will retain this right so long as there is a single material issue, the affirmative of which lies upon him and as to which he means to adduce evidence. In *Rawlins* v. *Desborough*, for example (2 M. & R. 328), where the declaration was upon a policy of life insurance with the ordinary money counts and the pleas were in avoidance and, to the money counts, "never indebted," Lord Denman ruled "that the plaintiff should begin, on the ground that there was a traverse of the *indebitatus* counts as to one of which his counsel stated that there really was evidence to be adduced on behalf of the plaintiff." The rule is the same in replevin, although there, when there is an avowry or cognizance, either party may be said to be plaintiff. Apart from any considerations as to the proof of damages, the real plaintiff, he who has brought the action, is entitled to begin whenever the affirmative is with him as to any material plea, although all the others lie upon the defendant: (*Collier* v. *Clarke*, 5 Q. B. 467; *Curtis* v. *Wheeler*, M. & M. 493). In the latter of these cases there was an avowry to which the plaintiff pleaded traverses of the tenancy and of the fact that rent was due, and also a plea, the affirmative of which was held to lie upon the plaintiff. It was argued that, since in replevin both parties are actors, the plaintiff should not have his usual privilage of beginning whenever any single issue lies upon him; but Lord Tenterden replied that he could make no distinction between replevin and other forms of action, and that the principles applicable to all were the same.

The defendant, however, who has pleaded none but affirmative pleas, will have the privilege of opening the case when the action has been brought really to try a right, and the plaintiff would be satisfied with merely nominal damages. Under such circumstances, if the true nature and object of the action appear to be at all doubtful, the plaintiff's counsel will be asked whether he really goes for substantial damages, and even when the reply is in the affirmative the Judge will exercise his discretion as to whether this is really so. Thus in *Mercer* v. *Whall*, in answer to the observation that the right of the plaintiff to begin could hardly well depend on his having to prove the amount of his damages, since in many cases it was almost impossible to say beforehand whether substantial damages were really sought, it was said by Lord Denman, "The Judge takes upon himself to say whether the plaintiff really proceeds for damages, or whether a right only is in question;" "the Judge, perhaps, decided this matter without very adequate materials, but he would not have done so at all, if the right depended on the issue as it appeared on the record." In such cases if the plaintiff's counsel decline to

pledge himself to go for more than nominal damages, it will be assumed that the plaintiff wants only to have the question of right decided; under these circumstances, in the absence of any proof on the part of the defendant of his pleas in confession and avoidance, the plaintiff would be at once entitled to the verdict which he desires; he has nothing to prove either as to his case or as to the amount of damages, and the defendant begins (*Chapman* v. *Rawson*, 8 Q. B. 673.) That the statement of the plaintiff's counsel will not be accepted as conclusive appears from *Bastard* v. *Smith*, 2 M. & R. 129. This was an action of trespass for diverting water; the only plea was one in justification under a custom. The plaintiff's counsel announced that his client sought to recover substantial damages, but Tindal, C. J. said, "No special damage is averred in the declaration beyond that arising from the simple fact of trespass complained of, viz., digging a trench of a certain length and depth; and indeed it appears from what is alleged as to the equity procedings (and which is not denied on the other side), that substantial damages are not in the contemplation of these parties. I think it falls within the general rule that as the affirmative lies on the defendant, he has the right to begin." This decision shows that in order to settle who shall open when the affirmative issue is on the defendant, the Judge must in the exercise of his discretion, and having regard to all the circumstances of the case, determine whether substantial damages are *bonâ fide* the object of the suit.—*Law Times*, July 18, 1868.

CRIMINAL LIABILITY WHERE THERE IS NO CRIMINAL INTENTION.

The legal maxim of *Actus non facit reum, nisi mens sit rea*, though in criminal cases of general, is not of universal application, since there are many violations of the criminal law in which it forms no excuse whatever. To instance only the well known principle so often declared from the judgment-seat when some poor wretch, in extenuation of his conduct, asserts that when he did the act for which he has been prosecuted he was drunk—that drunkenness is no excuse for crime, it will at once be understood that the absence of a criminal intention is not always an excuse for an act which the criminal law forbids. No doubt "it is," as said by Lord Kenyon in *Fowler* v. *Paget*, 7 T. R. 514, "a principle of natural justice and of our law that the intent and the act must both concur to constitute the crime." And as remarked by Erle, C. J., in *Bruckmaster* v. *Reynolds*, 13 C. B., N. S., 68, "a man cannot be said to be guilty of a delict unless to some extent his mind goes with the act." But, as observed Mr. Broom in his Legal Maxims, "the first observation which suggests itself in limitation of the principle thus enunciated is, that whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it willfully or in some cases even ignorantly; and consequently the doing it may form the subject-matter of an indictment, information, or other criminal proceedings *simpliciter*, without any addition of the corrupt motive." The observations of Ashurst, J., in *Rex.* v. *Sainsbury*, 4 T. R. 427, puts the doctrine in a very clear point of view. He says: "What the law says shall not be done, it becomes illegal to do and is therefore the subject-matter of an indictment without the addition of any corrupt motives. And though the want of corruption may be the answer to an application for an information which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment where the judges are bound by the strict rule of law." Where a statute in order to render a party criminally liable requires the act to be done feloniously, maliciously, fraudulently, corruptly, or with any other expressed motive or intention, such motive or intention is a necessary ingredient in the crime; and no legal offence is committed if such motive or intention be wanting; but where the enactment simply forbids a thing to be done, motive or intention is immaterial so far as concerns the legal criminality of the act forbidden.

A recent illustration of this important principle is to be found in the case of *Rex* v. *The Recorder of Wolverhampton*, 18 L. T. Rep. N. S. 395. That was a case which arose out of a violation of the 20 & 21 Vic., c. 83 (Sale of Obscene Books Prevention Act), the 1st section of which enacts that it shall be lawful for any two justices upon the complaint that the complainant has reason to believe that any obscene books are kept in any house, &c., for the purpose of sale or distribution, complainant also stating that one or more articles of the like character have been sold, distributed, &c., so as to satisfy the justices that the belief of the complainant is well founded, and upon such justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, &c., to enter and to search for, and seize all such books, &c., as aforesaid found in such house, &c., and to carry the articles so seized before the justices issuing the said warrant, and such justices are then to issue a summons calling upon the occupier of the house, &c., to appear within seven days before any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier shall not appear at the said time, or shall appear, and the justices shall be satisfied that such articles or any of them are of a character stated in the warrant, and that they have been kept for any of the purposes aforesaid, it shall be lawful for them to order the articles so seized, except such of

them as they consider necessary to be preserved as evidence in some future proceedings, to be destroyed at the expiration of the time thereinafter allowed for lodging an appeal

It appeared that one Henry Scott, who was a tradesman, living at Wolverhampton was a member of a body called "The Protestant Electorial Union," the object of which was "to protest against those teachings and practices of the Romish and Puseyite systems which are in England immoral and blasphemous: to maintain the Protestantism of the Bible and the liberty of England, and to promote the return to Parliament of men who will assist them in those objects, and particularly to expose and defeat the deep-laid machinations of the Jesuits and resist grants of money for Romish purposes." In furtherance of the objects of this body, Mr. Scott had made considerable purchases of a pamphlet called "The Confessional Unmasked," which purported to show the supposed depravity of the Romish priesthood, and the iniquity of the confessional; and it did so by extracts from the works of certain Romish theologians who had written on the practice of auricular confession, in which matters of a most obscene and disgusting character were discussed as proper subject for inquiry at the confessional. Mr. Scott had, to promote the objects of his society of bringing down condemnation of the Roman Catholic confessional, sold publicly, at prime cost, a vast number of these pamphlets, when proceedings were taken against him under the section of the 20 & 21 Vic., c. 83, above quoted, and a great quantity of unsold pamphlets were seized at his house, and were in due course ordered by the justices to be destroyed. Having appealed against this decision, the case came on before the Recorder of Wolverhampton, who found "that the appellant did not keep or sell the said pamphlet for the sake of gain, nor to prejudice good morals, though the indiscriminate sale and circulation of them is calculated to have that effect; but he sold the pamphlets as a member of the said Protestant Electoral Union to promote the objects of that society, and to expose what he deems to be the errors of the Church of Rome, and particularly the immorality of the confessional." The learned recorder further said that he was of opinion that under the cricumstances the sale and distribution of the pamphlets would not be a misdemeanor, nor be proper to be prosecuted as such, and accordingly that the possession of them by the appellant was not unlawful within the meaning of the statute; and he therefore quashed the order of justices and directed the pamphlets seized to be returned to the appellant, but granted a case for the opinion of the Court of Queen's Bench upon the subject.

It will be observed that the right of the justices to seize the books was dependent upon the fact that they were of such a charactor and description that the publication of them would be a misdemeanor and proper to be prosecuted as such. Upon the case being argued in the court above, the judges differed from the recorder in his opinion upon the subject, holding that the publication of the pamphlets would be a misdemeanor, and proper to be prosecuted as such. In giving his judgment, Cockburn, C. J., says: "He (the recorder) reversed their decision upon the ground that, although this work was an obscene publication, and although its tendency upon the public mind was that suggested upon the part of the information, yet that the immediate intention of the appellant was not so as to affect the public mind, but to expose the practices and errors of the confessional system of the Roman Catholic Church. Now, we must take it upon this finding of the learned recorder that such was the motive of this publication—that its intention was honestly and *bonâ fide* to expose the errors and practices of the Roman Catholic Church in the matter of confession. Upon that ground the learned recorder thought that an indictment could not have been sustained inasmuch as to the maintainance of an indictment it would have been necessary that the *intention* should be alleged, namely that of corrupting the public mind by the obscene matter in question. In that respect I differ from him. I think that, if there be an infraction of the law, and an intention to break the law, the criminal character of such publication is not affected or qualified by there being some ulterior object which is the immediate and primary object of the parties in view, of a different and honest character.... I take it, therefore, that, apart from the ulterior object which the publisher of this work had in view, that the work itself is in every sense of the word an obscene publication, and that consequently, as the law of England does not allow of any obscene publication, such publication is indictable. We have it, therefore, that the publication itself is a breach of the law. But then it is said, 'Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion, especially in the matter of the confessional.' Be it so; but then the question presents itself in this simple form. May you commit an offence against the law, in order that thereby you may effect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is emphatically, 'No.'..... I take it that where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from the act, and that as soon as you have an illegal act thus established *quoad* the intention and *quoad* the act itself, it does not lie in the mouth of a man who does it to say, 'Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.' The law does not allow that. You must abide by the law, and if you accomplish your object you must do it in a legal manner or let it alone; you must not do it in a manner which is illegal." Other learned judges expressed similar views.

It will be observed that the right of the justices to seize and destroy publications as mentioned in the case, depended solely upon whether or not they were of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such. It was necessary therefore for the judges to decide whether or not this publication, admitted to be obscene and calculated to prejudice good morals, would support an indictment, the publisher not disposing of the pamphlets for the sake of gain, nor in fact to prejudice good morals, but to promote a lawful object. The language of the Chief Justice, in holding that it would support an indictment was not more emphatic than it was sound. The maxim of "You shall not do evil that good may come" is (as was said by the Bench) applicable in law as well as in morals. Indeed if the converse of such a doctrine were permitted, the man who gives another a dose of poison to terminate bodily suffering and put a a speedy end to a painful, fatal malady, would stand excused of crime, and it would be an available plea in the mouth of a man who blew out the brains of another who was struggling in the jaws of death, that he did it, as he commonly done to the lower animals, to release him from a state of suffering which could not but speedily terminate in death. The case we have made the principal subject of these remarks cannot but be looked upon henceforth as a leading authority.—*Law Times.*

MARRIED WOMEN.

The Bill "to amend the law with respect to the property of married women," prepared and brought in by Mr. Shaw Lefevre, Mr. Russell Gurney, and Mr. J. S. Mill, contains only fourteen clauses, and bears evidence of having been carefully prepared. We think that upon the whole it is an advance, though unquestionably by a somewhat long stride, in the direction in which legislation and the practice of the Court of Chancery have been tending for years past, although the framer of the preamble seems disposed to deny any merits whatever to the existing law. The preamble states that the "law of property and contract, with respect to married women, is unjust in principle, and presses with peculiar severity upon the poorer classes of the community." The latter part of the preamble is unfortunately true, as an application to the Court of Equity by a married woman of the poorer classes is a serious step, yet the only one by which she can obtain assistance from those equitable doctrines which have displeased the common law as regards husband and wife. On the former part of it we do not in this place express any opinion. It is then enacted (section 1), that a married woman shall be capable of holding, alienating and devising property and of contracting as a *feme sole*, and (section 2) that property of women married after the Act, which is to come into operation on the 1st January, 1869, whether belonging to them before marriage or accquired by them after marriage, shall be held by them free from the debts of their husbands, and from their control or disposition, as if unmarried.

It is clear that the best advice that it is in our power to give to a woman about to be married must be, "Wait until the 1st of January, 1869." That the wife's property should be exempted from the husband's debts is highly desirable, but how are you to exempt it from his control? We fear that it is beyond the power, even of Parliament, to do that. Suppose the case of a husband and wife under the new law, being of that class where of all others a settlement of the wife's property is most desirable, the class of traders. Under the law, as it is to be, the wife retains her property; before long, without doubt, she will be asked to put it into the business, possibly to become a partner in it, to which we can see no legal objection under the new state of things. Would not ninety-nine women out of a hundred, in such a case, put their fortunes into their husband's hands to do what he liked with? and is not that the very evil which settlements were meant to avert? It is however, still open to a woman on marriage to make a settlement.

Section 3 extends to women already married the right to hold, as if unmarried, property acquired by them after the Act, subject to any settlement which they may have made of it, and to any vested rights of their husbands in it.

Section 4: the earnings of a married woman to be her personal estate; is a valuable provision, extending to all married women the protection which, under the 20 & 21 Vic., c. 85, deserted wives only were enabled to obtain. This provision will undoubtedly be a great boon to the lower classes of society.

Section 5: a husband shall not be liable for his wife's debts incurred before marriage, or for any wrong committed by her.

Section 6 repeals in part the existing law of distribution, giving the husband the same distributive share in the personalty of his intestate wife as she would take, on his dying intestate, in his personalty.

Section 7 reserves the tenancy by the curtesy.

Section 8 provides for a state of things that will, no doubt, often occur. Questions between husband and wife as to chattels are to be decided in a summary way, either by the Court of Chancery or by a County Court, as the case may be, the right being reserved to the petitioner of applying to the county courts, whatever the amount at stake may be. It is probably by an oversight that no provision has been made as to the amount that may be adjudicated upon in the Superior Court and County Court respectively. As the bill stands, the *forum* will be entirely in the option of the petitioner, irrespectively of the amount at stake.

Section 9, however, prevents one class of these questions from being raised, by providing that a husband shall not be liable to account for his wife's income and personalty received by him with her sanction; although we can conceive a good many nice questions being raised as to what amounts to such sanction on her part.

Section 10 contains a saving of existing settlements, and power to make future settlements, and does away with the doctrine of restraint on anticipation as a bar to the claims of the creditors of the wife, where such restraint is contained in any future settlement.

Section 11 extends the principle of the Infants Settlement Act, 18 & 19 Vic., c. 43, enabling a girl (even if under seventeen apparently) to make binding settlements with the consent of her parents or guardian, and of her intended husband, and saves the husband's covenant for settlement of wife's after-acquired property made before the Act comes into operation.

We have thus endeavoured to give a short sketch of the principal features of this Act, which, however it may be amended, must, if it passes, modify to a great extent, if not revolutionise, the position of married women in England as regards property.—*Solicitors Journal.*

THE 'LAW TIMES' AND THE 'LAW REPORTS.'

Our cotemporary, the *Law Times*, has, with that complacency which never forsakes him under the most trying circumstances, reviewed the conditions and prospects of the two rival monthly Reports, the 'Law Journal Reports,' and the 'Law Reports.' He has learned with sorrow, though not with surprise, that the balance sheet of the 'Law Reports' displays a considerable deficiency. But the sorrow is alleviated by the reflection that after all a balance can be struck by a curtailment of the salaries of the reporters to the tune of about 4,000*l.*; and that, as those gentlemen embarked in the concern on speculation, their misfortune, is of no particular account. Independently of this very trifling question of paying the real labourers in the vineyard, the *Law Times* declares emphatically that the *concern is solvent, and both ends are made to meet.* Three weeks ago, another legal contemporary gave its readers an insight into the report of one of the auditors of the 'Law Reports' and we ventured to cite that statement in our own columns. But it appeared that the deficiency on the two years 1866 and 1867 stood at '4,007*l.*, exclusive of 3,862*l.* 10*s.*, due to reporters, and the sum of 571*l.* paid by the Inns of Court and Law Society.' So that, beyond the insignificant detriment to the purses of the reporters, there was a loss of more than 4,500*l.* on the general working of the concern for two years. It follows that in the opinion of our cotemporary the *Law Times solvency* means a dead loss exceeding 2,000*l.* per annum.

But the disease having been thus analysed, and described in language of singular modesty, the prescription for a cure follows in due course. The 'Law Reports' cannot flourish unless they can add one thousand names to their subscription list, and that feat, says the *Law Times*, they will not accomplish. There is a hint thrown out that the first year is the best year which the 'Law Reports' have seen, or ever will see. Curiosity and novelty attracted a body of subscribers. The reaction has come, and that, too, at a time when the profession is very poor, and when cash is unusually scarce among its members. Even the *Law Times* cannot get in its money. So what possible chance have the 'Law Reports,' which insist on *payment in advance.* Therefore the 'Law Reports' must cut down expenditure by abolishing the Weekly notes and Statutes, and after that tremendous jettison their ship may possibly gain the port. This is the statement and the advice of the *Law Times*, and it assuredly is not for us to express any opinion on the efficacy of the suggested remedy. It is enough to say that whatever may be the exact state of legal business, our experience in the payment of accounts does not coincide with that which is so naively and piteously disclosed by the *Law Times;* and we suppose that, if the profession is really as poor as it is averred, we ought to render very hearty thanks for the prompt manner in which our subscribers discharge their dues toward us.

But has the whole case as to the 'Law Reports' been stated? We have refrained hitherto, and intend to refrain, from anything like hostile comment on that publication, but at least we shall be guilty of no breach of decorum in quoting a passage from a report dated June 17, 1867, and signed by no less a person than Sir Roundell Palmer. The words are these: 'The accounts for the year ending December 31, 186 , have been duly audited; and after taking *credit for the stock on hand at the subscription price*, the expenses of the year including the additional cost of the Weekly Notes and the Statutes, and payment in full of the salaries of the editors, secretary, and reporters have been met.' It would, therefore, at first sight appear that the enormous deficiency of 8,000*l.* has been incurred in the year 1867. But the real construction of this somewhat ambiguous clause seems to be that a clean balance sheet was shown by taking credit for unsold copies just as if they had been sold, a method of computation concerning which we forbear to say more than that the same result would have been achieved, if not a single copy had ever been sold. On this principle, the Council might have reprinted a few extra thousand copies every year, taken credit for them at *full subscription price*, and shown a balance in their favour to all eternity. Quitting, however, this question, of which time will be the best exponent, we hasten to see

what the *Law Times* has to say of ourselves. For once we are driven to believe that our eyes are no longer to be trusted. Besides the method of cure already proclaimed, the *Law Times* has a sovereign remedy for the maladies of his patient. 'Let the "Law Reports" buy up the Law Journal.' The *Law Times* says there is no room for two monthly reports. We deny the axiom, holding that free trade in reporting and fair competition are absolutely essential. Monopoly would produce delay, inferior work, and increased price. But even if monopoly was desirable, what could be more extraordinary than the proposition of the *Law Times?* Of course, if solvency means a series of dead losses, power to purchase may be equivalent to inability to pay debts. But of all the brilliant suggestions ever offered to a concern, none ever exceeded the notion of buying up an immense rival business with the sum of 8,000*l.* *debts.*—*Law Journal.*

CONFLICT OF JUDICIAL DECISION.

It is a great evil when cases disagree as they do so conspicuously in many departments of our law. We are sure, however, that it is not a greater evil when by reason of the divergence of judicial opinion causes go undecided or decided only in a partial and unsatisfactory manner. Recently, the Common Law Courts, which can alone give us examples of this, have been very prolific, and we shall direct attention to one or two instances.

Very numerous are the cases in which a single member of the court stands alone in his opinion, as did Bramwell, B. in a most important shipping case reported this week; and as did Bovill, C. J. in a case of equal moment affecting deeds of composition, also reported this week. Where this incident takes place in the court below, we are not so much disposed to complain, because it shows a healthy state of thought and an independence of opinion which is of advantage to the community. But it is otherwise when a division arises in a court of error, so as exactly to cut the court in two, and leave the decision appealed from *in statu quo*. A glaring instance of this is noticed by our reporter in the Court of Exchequer Chamber. The question involved the intrusion of the sheriff. In the Court of Exchequer Barons Martin and Bramwell decided against the privilege, contrary to the judgment of the Lord Chief Baron. Upon the appeal, three Justices of the Queen's Bench concurred with the judgment of Barons Martin and Bramwell, whilst three Justices of the Common Pleas concurred with the judgment of the Lord Chief Baron. Thus the appeal fell through. If an appellate court thus divides itself in such equal proportions is it surprising that twelve jurymen should sometimes find it difficult to agree?

But this is not all. Upon the question what are and what are not necessaries, the court of appeal was equally at sea, and after deliberating for three quarters of an hour, it was announced that judgment must remain suspended, further time being required for consideration. We sincerely hope that when judgment is delivered we shall not find one Judge reading the opinion of himself and two others, and the fourth Judge reading the opinions of himself and the remaining Judges, but that care will be taken to arrive at some unanimous judgment, even if some concession has to be made upon one side or the other.

We do not say that these divisions reflect upon the capacities of the Judges, but we feel bound to say that they make our system of administering justice appear very contemptible at times, and would induce us to wish that single Judges should preside as in equity, were it not that we see manifest disadvantage attaching to such a tribunal at common law. Every effort should be made to give at least a semblance of authority to the judgments of the Court of Exchequer Chamber. Its present mode of conducting its business is the strongest argument in favour of its abolition, and the adoption of the House of Lords as the only court of appeal.—*Law Times.*

The Opinion of the Profession.—When a text-writer, an advocate, or a partisan is put in the wrong or otherwise annoyed by a judicial decision, he consoles himself by saying that the 'opinion of the profession' is the other way. So Mr. Whalley says that the judgment of the Queen's Bench, in condemning the 'Confessional Unmasked,' has excited murmurs in Westminster Hall. There are always one or two wrong headed men in every profession, upon whom the united authority of any number of judges would have no effect; but it is our belief that, with some such possible exceptions, the decision has elicted universal approbation.—*Law Times.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

Ex. Parte George Henry Martin.

Extradition—Ashburton Treaty—Con. Stat. Can., cap. 89—Stat. 24 Vic. cap. 6—29 & 30 Vic., cap. 45—Regularity of Proceedings—Admissibility of Evidence.

Where a prisoner in custody under the Ashburton Treaty obtained a *habeas corpus* and *certiorari* for his discharge, it was held that the argument as to the regularity or irregularity of the initiatory proceedings, such as information, warrant, &c., was a matter of no consequence; the material question being, whether—being in custody—there was a sufficient case made out to justify the commitment for the crime charged.

It was held that certified copies of depositions sworn in the United States, after proceedings had been initiated in Canada, and after the arrest in Canada, were admissible evidence before the Police Magistrate.

[Chambers, June 29, 1868.]

McMichael obtained a *habeas corpus* directed to the Gaoler of the Gaol in Hamilton, where the prisoner was confined, to have his body before the presiding judge in Chambers, &c., and at the same time he obtained a writ of *certiorari* under 29–30 Vic. cap. 45, addressed to the Police Magistrate of the City of Hamilton, for a return

of the informations, examinations and depositions touching the prisoner's commitment.

It appeared by the return to the *habeas corpus*, that the prisoner was in custody under a warrant of commitment issued by the Police Magistrate of Hamilton, upon a charge of robbery committed in the United States, and for the purpose of extradition, and that he was detained until surrendered according to the stipulations of the Ashburton Treaty, &c.

The examinations and depositions returned with the *certiorari* shewed that, early on the morning of the 1st of May, two persons broke into an express car on the Hudson River Railway, on its way to New York,—one Browne, an express messenger of the Merchants' Union Express Company, being in charge of a safe containing a large amount of money and securities. Browne at the time was asleep. They seized him, handcuffed him, threatened his life, tied his hands and legs together, and himself to a stove in the car, took the keys from his pocket and rifled the safe of its contents, and, as the train approached New York, having gagged him, they leaped from the car, taking with them, with other property, over $100,000 in United States Bonds. Browne swore that although they had dominoes partly secreting their faces, that he had an opportunity of noticing their appearance, so as to be able to describe them, and in his deposition he states their sizes, complexion, color of hair, whiskers, eyes, and voice. The numbers of the bonds and their description being known to the parties who entrusted them to the care of the company, they were described in a printed circular, which was sent to brokers and others, and some of these circulars came into the possession of a Mr. Wilson, a broker in Hamilton. On the 20th of May, the prisoner came to this broker's office, and offered to sell $500 of coupons and five United States five-twenty Bonds. Mr. Wilson, referring to the circular, noticed that the numbers of the bonds corresponded with those of the stolen bonds, and he declined to purchase, telling the prisoner why, and shewing him the circular, and, at prisoner's request, gave him one of the circulars. The prisoner then left the broker's office—his movements were watched, and he was seen to pass through various streets, and eventually go into an uninhabited house, when the person watching missed him. The same evening he was arrested under the warrant produced, which described him as "a man, name unknown." He denied having any of the bonds or coupons, or that he offered any for sale to the broker; none were found on his person—the circular which he received from the broker he had with him. Upon a search at the vacant house he was seen to enter, the Chief of Police found the bonds and coupons secreted between the siding and wall of the coach house. On the following day the Assistant Secretary of the Company arrived in Hamilton, and deposed against the prisoner, by the name of Martin, as being a person answering to the description of one of the robbers. On his examination a good deal of evidence was taken, for the purpose of establishing that bonds bearing the numbers, &c., of those found were delivered to the Express Company, and in their charge in transit on the night of the robbery.

Upon reading the return to the writ of *habeas corpus*, and the examinations, depositions, &c., returned with the *certiorari*, *M. C. Cameron*, Q C., *Dr. McMichael* with him, moved that the prisoner be discharged.

They contended that the prisoner was entitled to his discharge on various grounds; among others, that the original information and warrant issued by the Police Magistrate, and upon which the prisoner was arrested and charged, was made against "a man, name unknown," and that as the 2nd sec. of 24 Vic. cap. 6, only authorised the Police Magistrate to issue his warrant upon complaint charging any person (that is, by name) found within the limits of the Province, &c, the Police Magistrate had no jurisdiction and the proceedings were void. That certain depositions made in the United States after the arrest of the prisoner here, were not receivable in evidence before the Police Magistrate, and without these there was no evidence of a robbery committed. And further, that if these depositions were receivable, still there was no evidence of the identity of the prisoner as one of the robbers, and no evidence to shew that the property seen with the prisoner, or in his possession, was any of the property alleged to have been stolen.

The depositions to which exceptions were taken were depositions made and sworn to on the 30th of May, in New York, and upon which a warrant was issued on the 1st of June, by the Recorder of that city, against the prisoner, for robbery. The prisoner having been arrested on the 21st May, in Hamilton, and being under examination for committment under the Treaty and our statute, upon the same charge of robbery, and during his examination these depositions were received against him by the Magistrate on the 4th June, under the provisions of the 3rd sec. of 24 Vic., cap. 6, as it was conceded that unless these depositions could be received, the prisoner was entitled to be discharged, as without them there was no evidence of the robbery.

Harrison, Q C., appeared on behalf of the Express Company, and

James Paterson on behalf of the Minister of Justice and Attorney-General for the Dominion, and opposed the discharge.

They contended that the only question for determination was, whether there was sufficient evidence to justify the committal of the prisoner. They submitted that the depositions taken on the 30th May, were properly received by the Police Magistrate, and after receiving the evidence at length, they argued that there was evidence of identification of the prisoner, and that property alleged to have been stolen was found in his possession shortly after the robbery.

Morrison, J.—I have carefully read all the testimony, including the depositions taken in the United States, and I am of opinion, assuming that they were all receivable on the hearing before the Police Magistrate, that he was warranted in committing the prisoner for the purpose of his extradition, and that a sufficient case was made out against the prisoner to justify his apprehension and committal for trial, if the crime of which he was accused had been committed in this Province; and the circumstances proved are so suspicious that if the robbery had taken place

here the magistrate would not have been justified in discharging the accused. It is not the province of the Police Magistrate to determine the questions of fact, if he finds sufficient evidence to justify a commitment. Whether there is a probability of the prisoner being eventually convicted of the offence, after a trial, is not a question for his or for my consideration.

I shall now consider the legal objections to these proceedings.

As to the first, that the Police Magistrate had no jurisdiction, by reason of the original arrest and warrant being irregular and defective, I see nothing in the objection. Assuming that the initiatory proceedings were irregular and unjustifiable, in my judgment it is a matter of no moment and beside the present enquiry, whether the prisoner originally was arrested upon a void warrant, or without complaint or warrant, or whether, as contended, the warrant was for a charge of robbery of $20,000 and it turned out to be $20,000 in United States Bonds; the material question is, being in custody, whether a sufficient case was made out to justify his commitment for robbery, with a view to his extradition. It is obvious that offenders flying from the United States into this Province in order to elude arrest, would, when discovered here, in many cases, escape in consequence of the impossibility of obtaining the necessary proof at the moment, to authorise a warrant for their apprehension, unless some peace officer, satisfied of the guilt of a party, would assume the responsibility of his detention, until the regular proof was forthcoming. And it would be discreditable to our laws to hold that because in a case of this nature the original arrest was technically irregular (after the case was heard and the prisoner committed) the whole proceedings should be declared to be *coram non judice*, and the prisoner discharged.

Then, as to the objection that the depositions taken in New York, on the 30th May, were not receivable in evidence under the provisions of the 3rd sec. of our act, I had on the argument some doubts as to their admissibility, but upon consideration have come to the conclusion that the objection is untenable. The question resolves itself into this, whether when an offender is arrested in this Province for a crime committed in the United States for the purpose of extradition, can depositions taken in the United States after his arrest here and upon which a warrant issued against him in the United States upon the same charge, be received as evidence against the accused, upon the hearing of the case before the Police Magistrate.

It is admitted that the proceedings against the prisoner, may be originated in this country. It cannot be doubted that before or after his arrest here, a warrant may be issued in the United States founded upon depositions taken there. On the argument no reason or authority was adduced against using depositions taken in the United States during the pendency of the proceedings against the prisoner before the Police Magistrate, except by a very critical reading of the 3rd sec. of our statute, to shew that the framer of that section intended that before its provisions should apply, the depositions should be made, and a warrant issue in the United States, before the arrest of the accused in this country; but in construing and applying that section we must look at the spirit of the provision, not the mere letter, and in the language of our Interpretation Act, Con. Stat. of Canada, we must give it "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the act and of such provision or enactment, according to their true intent, meaning and spirit." What the section evidently intended was, that any depositions made in the United States, before proper authority and upon which a warrant issued for the arrest of the accused, should be received as evidence of his criminality in the hearing before the Police Magistrate. The main object contemplated by the enactment, was to sanction the use of depositions and to avoid the necessity of bringing the deponents here. The referring to or connecting the depositions with the warrant in this section, was, in my opinion, for the purpose of ensuring that they should be such depositions as would be taken before competent authority, and in relation to the particular crime and the offence specified in the foreign warrant, and that the time when the warrant issued was immaterial. The value of the objection is apparent, when we consider that if the Police Magistrate had given effect to the objection, when taken before him by the prisoner's counsel, all that was necessary to be done was to issue a new warrant and begin the proceedings all new, and so get rid of the technicality—and if I were now to discharge the prisoner on this objection, practically I should do so upon the ground that the Police Magistrate did not go through the farce of abandoning the proceedings *pro forma*, saying to the prisoner, I release you for the purpose of re-arresting you, in order to read the depositions taken in New York against you. To discharge the prisoner from custody on such grounds, while it would be contrary to the spirit and intention of the Treaty and the provisions of our statute, would be a scandal and reproach to the administration of the law.

It was contended very strongly and zealously by Dr. McMichael, that the case was one of great hardship against the prisoner: that the true object of his extradition was for some purpose other than his trial for the robbery. I see no ground for apprehending that such is the case and I have not the slightest doubt that the prisoner will be fairly dealt with by the Government of the United States, as well as the courts of law there, and that nothing will be done against the prisoner contrary to the spirit and object of the Treaty—nor am I pressed with any serious doubts as to the propriety of the view taken of the case by the Police Magistrate. The prisoner's conduct from the time he offered the securities for sale, until and after his arrest, without explanation, is quite inconsistent with innocence, and indicates forcibly guilty knowledge. It may turn out, as suggested, that he is only a receiver of the stolen property, but the facts disclosed would be evidence to some extent to go to a jury against the prisoner, for a taking by him. I am therefore of opinion that I should not discharge the prisoner, but that he should be remanded, to be dealt with as His Excellency the Governor-General, may be advised.

Prisoner remand d.

ENGLISH REPORTS.

COMMON PLEAS.

Leete v. Hart.

False imprisonment—Giving person in custody found committing offence—24 & 25 Vict. c. 96, s. 103.

A person found committing an offence against the Larceny Act may be immediately apprehended by any person without a warrant, provided, according to the rule laid down in *Herman* v. *Seneschal*, and adopted in *Roberts* v. *Orchard*, the person so apprehending honestly believes in the existence of facts, which, if they had existed, would have justified him under the Statute.

Held, that this belief must rest on some ground, and that mere suspicion will not be enough.

[16 W. R. 676; April 2, 1868.]

This was an action for false imprisonment. Plea.—Not Guilty by Statute, 24 & 25 Vict. c. 96, ss. 51, 103, 104, and 113.

At the trial before Byles, J., at the last Guildhall sittings, it appeared that the defendant, who lived in a suburban villa, had been on several occasions alarmed by attempts made to break into his house during the night. On the night of the 5th of October last, about half-past twelve, he was in a back room on the ground floor, and and on looking out of the window he saw a man at his back door, who, he concluded, was trying to effect an entrance. He at once ran up stairs to his bedroom to fetch a sword and pistol, and alarmed his wife, who had already gone to bed. She ran down out of the front door screaming police, and seeing a man standing at the garden gate in front of the house, gave him in custody to a policeman who came up at the moment. This man was the plaintiff. Shortly afterwards the defendant came down with his sword and pistol, and saw his wife standing with the policeman at the gate. The wife, pointing to the plaintiff, said, 'that is the man," or words to that effect, and the defendant thereupon gave him into custody; but after they had proceeded some fifty yards on the way to the police station the defendant, on the plaintiff's assurance that he was a respectable man and a neighbour of his, expressed his wish to withdraw the charge; they, however, went on to the police station. The plaintiff it appeared lived in the same row of houses as the defendant, and was walking home along the pavement, and was within a stone's throw of his own house, when he heard the defendant's wife screaming police, and stopped at the garden gate to learn what was the matter, and was then given in custody. A centre bit was found next morning at the back of the house. On these facts, no witnesses being called for the defence, the jury found for the plaintiff, with £10 damages.

Foard now moved, pursuant to leave reserved, to enter the verdict for the defendant.

The plea is founded on sections 51, 103, 104, & 113, of the Larceny Act, 24 & 25 Vict. c. 69. The 51st section defines the crime of burglary; by the 103rd section "any person found committing any offence punishable either upon indictment or upon summary conviction by virtue of this Act except only the offence of angling in the day time, may be immediately apprehended with a warrant by any person," &c. By the 104th section "any constable or peace officer may take into custody without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act," &c.; and the 113th section provides that in an action for anything done in pursuance of the Act, notice shall be given to the defendant, and that he may plead the general issue, and give this Act, and the special matter, in evidence thereunder.

The Act was intended to protect those who have by mistake exceeded their duty; and the defendant here *bonâ fide* believed that an attempt at burglary had been committed: *Roberts* v. *Orchard*, 12 W. R. 253, 2 H. & C. 768; *Read* v. *Coker*, 1 W. R. 418, 13 C. B. 850; *Heath* v. *Brewer*, 15 C. B. N. S. 803; *Hermann* v. *Seneschal*. 11 W. R. 184, 13 C. B. N. S. 392; *Downing* v. *Capel*, 15 W. R. 745, L. R. 2 C. P. 461. He was misled by an existing state of facts, over which he had no control.

Bovill C. J.—I am of opinion that this rule should be refused. *Roberts* v. *Orchard*, did not introduce any new law on the point, but the case must be decided on the law as previously laid down, and especially in *Hermann* v. *Seneschal*. In *Roberts* v. *Orchard*, the question was whether the judge should have asked the jury if the defendant honestly believed that the plaintiff had taken the money, and that in giving him into custody, he was exercising a legal power; and it was decided that it would not be enough to ask them that, but that they should also be asked whether the defendant honestly believed that the plaintiff had been found committing the offence. But as to the rule of law, the Exchequer Chamber adopted what had before been laid down by Williams, J., in *Hermann* v. *Seneschal*, viz., that the defendant has the protection of the statute "if he honestly intended to put the law in motion, and really believed in the existence of the state of facts, which, if they existed, would have justified him in doing as he did." That I take to have been the rule before *Roberts* v. *Orchard*, and it was not interfered with by that case, and must be applied here. Did the defendant then in this case to adopt the words of Williams, J., in *Roberts* v. *Orchard*, "honestly believe in the existence of those facts which, if they had existed, would have afforded a justification under the statute?" It is clear that it is not necessary that an offence should have been committed under the statute by any one, here there was certainly no such offence committed by the plaintiff, and there is nothing to satisfy me that the defendant did believe facts which, if they had existed, would have justified him, or that the plaintiff was found committing any offence under the Act. There was no entry, no robbery, and no attempt; and further an attempt at robbery is not within the statute. The case is not brought either within the 51st or the 58th section; and there is no evidence of any such belief as is required on the part of the defendant, or of any other circumstance to bring the case within the Act.

Byles, J.—I am of the same opinion, and will only add one further on *Roberts* v. *Orchard*. My brother Willes there says, "it is clear to my mind, from the defendant's evidence in answer, that he was acting on mere suspicion." Mere suspicion will not do for belief is a state of mind which

rests on some ground, and therefore I doubt whether *Roberts* v. *Orchards*, has much changed what was considered to be the law on the subject before. *Hermann* v. *Seneschal* was a case in which the plaintiff was given into custody on the suspicion of passing bad money; and Erle, C.J., says, "the jury having found that the defendant did really believe that the plaintiff had passed him a counterfeit coin, and did honestly intend to put the law in force against him, and as I am clearly of opinion that the facts were sufficient to justify that conclusion, I do not think that the other part of the finding, viz., that the defendant had no reasonable ground for such his belief, entitles the plaintiff to retain the verdict." *Roberts* v. *Orchards*, therefore reposes on the same ground as that case, for there were no facts there sufficient to justify the belief.

Keating, J.—I am of the same opinion. The rule in *Roberts* v. *Orchard*, is not meant to be impinged upon by any judgment of ours. Did the defendant honestly believe in a state of facts which, if true, would justify him? That is the question. If he acted upon what he had been dreaming, that would not be sufficient. I cannot see what the facts are which he believed in, and which if they had existed would have justified him. There is no evidence that any offence had been committed on that night by anyone; much less that any one had been found committing any offence. How could the defendant honestly believe in facts which, if true, would justify him?

Montagu Smith, J.—I am of the same opinion. In *Read* v. *Coker*, Jervis, C.J., lays it down broadly that "to entitle a defendant to a notice of action it is enough to show that he *bonâ fide* believed he was acting in pursuance of the statute for the protection of his property." Perhaps the rule stated in those general terms may be too wide; but the rule laid down by Williams, J., in *Roberts* v. *Orchard*, is enough for us in disposing of this case, and the defendant has not brought himself within it; and the meaning of the rule is, the defendant must not only believe that he is right in law but that those facts exist, which if they had existed, would justify him; and that was the view of Parke, B., in *Hughes* v. *Buckland*, 15 M. & W. 346, where the plaintiff was apprehended while fishing, for he says, "The defendants, in order to be protected, must have *bonâ fide* and reasonably believed Colonel Pennant to be the owner of the place where the plaintiff was fishing, and that the trespass was committed within the limits of his property;" and so it was held in *Downing* v. *Capel*. Here I am not satisfied that the defendant believed, indeed I think that he did not believe, that his house had been broken into. The defendant himself might have satisfied the jury as to the state of his mind, but he did not choose to undergo the ordeal.

Rule refused.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR FEBRUARY, MARCH AND APRIL, 1868.

(*Continued from page 155.*)

Action.—*See* Banker.

Administration.

1. A bankrupt was indebted to the estate of A., and was entitled as one of the residuary legatees of A., and also as next of kin to another residuary legatee. The executor of A. proved the debt under the bankruptcy, and received a dividend. *Held*, that the executor had thereby abandoned the right to retain the debt out of the direct or derivative shares of the bankrupt in A.'s estate. — *Stammers* v. *Elliott*, Law Rep. 3 Ch. 195.

2. In an administration suit by a residuary legatee, the court has jurisdiction to compel the plaintiff to refund, for the purpose of paying pecuniary legatees who are not parties to the suit, assets paid to the plaintiff by the executor before the suit.—*Prowse* v. *Spurgin*, Law Rep. 5 Eq. 99.

3. A testator domiciled in England gave his personal property, situate in England and Scotland, to two of his sons, and appointed his three sons executors. The will was proved in England by two of the sons, and also recorded in the Scotch Consistory Court. At the testator's death, the other son, one of the residuary legatees, was indebted to a company carrying on business both in Scotland and England, who obtained a judgment in Scotland against such son, and proceeded there against the executors to arrest the amount in their hands to which the indebted son was entitled. The court, upon the executors undertaking to obtain forthwith an administration decree in England, enjoined the proceedings against the executors in Scotland.—*Baillie* v. *Baillie*, Law Rep. 5 Eq. 175.

Admiralty.

Under a statute giving the Admiralty jurisdiction "over any claim of damage done by any ship," the Admiralty has jurisdiction of a cause of damage for personal injuries done by a ship.—*The Sylph*, Law Rep. 2 Adm. & Ecc. 24.

See Award, 2; Collision; Costs.

Agent.—*See* Custom; Equity Pleading and Practice, 3; Factor.

Agreement.—*See* Contract.

Annuity.—*See* Bankruptcy, 1; Will, 3.

Arbitration.—*See* Award.

Assignment.—*See* Company, 1.

Assumpsit.—*See* Ship, 2.

Attorney.—*See* Costs; Equity Pleading and Practice, 3; Necessaries, 1; Partnership.

Award.

1. A cause and all matters in difference were referred by an order which provided that the costs of the reference should abide the event of the award. The arbitrator decided the cause for the defendant, and, with regard to the matters in difference, awarded that the plaintiff had a valid claim against the defendant, and the defendant a valid claim against the plaintiff of a larger amount, and directed the plaintiff to pay the defendant the difference. The claims were unliquidated, and could not have been set off against one another in an action. *Held*, that the event of the award was wholly in the defendant's favor, and that he was therefore entitled to the costs.—*Dunhill* v. *Ford*, Law Rep. 3 C. P. 36.

2. A diver, having been injured by a ship, brought an action against the owners, which was referred to arbitration, under an agreement that all the rights of the plaintiff should be reserved, in case the award was not performed. The arbitrator awarded compensation, but the defendants never paid. *Held*, that the plaintiff was not debarred from proceeding *in rem* in the Admiralty.—*The Sylph*, Law Rep. 2 Adm. & Ecc. 24.

Banker.

Whether by virtue of the relation between banker and customer any legal duty is imposed on the banker not to disclose his customer's account, except on a reasonable and proper occasion, so as to give a cause of action without special damage, *quære*.—*Hardy* v. *Veasey*, Law Rep. 3 Ex. 107.

Bankruptcy.

1. A husband covenanted in a deed of separation to pay an annuity to his wife, the annuity to cease in the event of future cohabitation by mutual consent. *Held*, that the value of the annuity was not capable of calculation, and that the annuity was therefore not provable under the Bankrupt Acts.—*Mudge* v. *Rowan*, Law Rep. 3 Ex. 85.

2. A trader, being indebted to the defendant, gave him his acceptance for the amount due. Three days before the acceptance was due, he agreed to give the defendant a bill of sale of all his goods, in consideration of the defendant taking up the acceptance, and in order to cover any further advance by the defendant. The defendant took up the acceptance, and afterwards advanced the trader £64, on the understanding that it should be secured by the bill of sale. The bill of sale was subsequently executed, whereby all the personal estate of which the trader was or should in future become possessed, was assigned to the defendant as security. The trader's property was worth about £115. Less than a year after the date of this bill of sale, but more than a year after the date of the agreement to give it, the trader was adjudicated bankrupt. In trover by the assignee for the goods included in the bill of sale, some of which had been acquired after the agreement, *held*, that the £64 was a fair present equivalent for the assignment, and that the plaintiff could not recover (Exch. Ch.)—*Mercer* v. *Peterson*, Law Rep. 3 Ex. 104.

See Administration, 1; Priority; Stamp.

Bill of Lading.

In an action on a bill of lading by an indorsee against the ship-owners, the plaintiff put in the bill of lading, and proved that the consignors had indorsed and delivered it to A., and that A. had indorsed and delivered it to the plaintiff for value. *Held*, *prima facie* evidence of such an indorsement and delivery of the bill of lading as to vest the property in the goods in the plaintiff; and so transfer to him the right of action under the 18 & 19 Vic. cap. 111, sec. 1, which enacts that every indorsee of a bill of lading to whom the property in the goods passes by reason of the indorsement, shall have transferred to him the same rights of suit as if the contract in the bill had been made with him.—*Dracachi* v. *Anglo-Egyptian Navigation Co.*, Law Rep. 3 C. P. 190.

Bills and Notes.—*See* Company, 1; Conflict of Laws; Contract, 1; Embezzlement; Mistake; Sale.

Bond.—*See* Company, 1.

Bonus.—*See* Tenant for Life and Remainderman.

Broker.—*See* Custom.

Capital.—*See* Tenant for Life and Remainderman.

Charity.

A bequest to trustees, in trust for "such charities and other public purposes as lawfully might be in the parish of T.," is a good charitable gift.—*Dolan* v. *Macdermot*, Law Rep. 5 Eq. 60.

Cheque.—*See* Embezzlement.

Club.

The rules of a club authorized the committee to call a general meeting, "in case any circumstance should occur likely to endanger the welfare and good order of the club," and provided that any member might be removed by the votes of two-thirds of those present at such meeting. On a bill by a member so removed,

praying to be reinstated, *held*, that as, in the judgment of the court, the meeting was fairly called, and the decision was arrived at *bona fide*, and not through caprice, such decision was final, and the court could not interfere.—*Hopkinson* v. *Marquis of Exeter*, Law Rep. 5 Eq, 63.

Collision.

The owners of a foreign vessel claimed damages for a collision between their vessel and an English ship, in Belgian waters. The defendants, owners of the English ship, pleaded that, by the Belgian laws, pilotage was compulsory in the place where the collision occurred. *Held*, that the plaintiffs might plead in reply, that, by the same laws, the owner of the vessel in fault, though compelled to take a pilot, continued liable for damages.—*The Halley*, Law Rep. 2 Adm. & Ecc. 3.

Company.

1. B. agreed with the promoter of a company for the delivery to B. of debentures of the company, payable to bearer. The articles of the company adopted this agreement, and directed it to be carried out. Debentures were accordingly issued to B., under the seal of the company, by each of which the company covenanted to pay the sum mentioned therein to "B., his executors, administrators and assigns, or to the holder hereof." These bonds were delivered by B. to Z., a *bona fide* holder, for value. *Semble*, that at law Z. could not sue on these debentures in his own name; and, *quære*, whether they were good at law as bonds or not; but, *held*, that, as they were conformable to the above-mentioned agreement, effect must be given to them in equity according to their tenor, and that therefore, in the winding up of the company, Z. could prove on them in his own name, and free from any equities between the company and B.—*In re Blakely Ordnance Co.*, Law Rep. 3 Ch. 154.

2. A. owned a house on a highway. A railway company, under powers given by statute, made an embankment on the highway opposite the house, thereby narrowing the road from 50 to 33 feet, thus materially diminishing the value of the house for selling or letting, and obstructing the access of light and air. *Held*, (1) that A. had sustained particular damage from the works; (2) that the damage would have been actionable if it had not been authorized by statute; (3) that the injury done was an injury to A.'s estate, and not a mere obstruction or inconvenience to him personally or to his trade; and that, these three things concurring, A. was entitled to compensation under 8 Vic. caps. 18 & 20.—*Beckett* v. *Midland Railway Co.*, Law Rep. 3 C. P. 82. See *Ricket* v. *Metropolitan Railway Co.*, Law Rep. 2 H. L. 175 (2 Am. Law Rev. 273).

See Contract, 2.

Conflict of Laws.

On a bill of exchange payable to order—drawn, accepted, and payable in England—the contract of the acceptor is to pay to an order valid by the law of England; and an endorsee can sue the acceptor in England, under an indorsement valid by the law of England, though the indorsement was made in France, and by the law of France gave the indorsee no right to sue in his own name, and though the indorser (who was also drawer and payee) and the indorsee were, at the time the bill was made and indorsed, domiciled and resident in France.—*Lebel* v. *Tucker*, Law Rep. 3 Q. B. 77.

See Administration, 3; Collision; Equity Pleading and Practice, 1.

Contempt.

In a suit for having removed human bones and portions of the soil from a churchyard to a field belonging to the defendant, the Court of Arches issued a monition directing the defendant to replace, before a certain day, the bones and earth removed. The defendant failed to comply with the order, alleging that he was unable to do so, because said field was no longer in his occupation or possession. *Held*, that his conduct amounted to contempt of court.—*Adlam* v. *Colthurst*, Law Rep. 2 Adm. & Ecc. 30.

Contract.

1. Where a bank has issued a letter of credit, on the terms that the bills which they agree to accept are to be covered by bills of lading, suspension of payment by the bank before there has been time for the letter of credit to be used, is not a breach or repudiation of the contract; because the liquidators, under the winding up of the bank, might have received permission to negotiate the bills, and a claim by the holder of the letter of credit for damages for the alleged breach was disallowed.—*In re Agra Bank*, Law Rep. 5 Eq. 160.

2. The plaintiff agreed through a broker to sell his shares in a company to a jobber for £200. By the usage of the Stock Exchange, the transfer would not be made till a future day, and in the interval the shares might again be sold till a certain day, when the original buyer must name the person to whom the shares should be transferred. Accordingly, the shares were finally sold to the defendant for £145 (a call having been made in the meantime), and the plaintiff gave the defendant a

deed transferring the shares to him, the consideration named in which was £145, the difference being paid to the plaintiff by the jobber. The defendant never registered the transfer, and an order was made for winding up the company. The plaintiff was compelled to pay calls on the shares, and filed a bill for specific performance and repayment, alleging a purchase by the defendant for £200. *Semble*, that there was a contract between the plaintiff and the defendant, and that the making of the call did not invalidate the contract; but *held*, that the alleged contract to purchase for £200 was not proved.—*Hawkins* v. *Maltby*, Law Rep. 3 Ch. 188.

See Custom; Damages; Frauds, Statute of; Mistake; Parties; Sale; Ship, 2; Specific Performance; Vendor and Purchaser of Real Estate, 2; Warranty.

Conversion.—*See* Ship, 2.

Corporation.—*See* Company; Tax.

Corpus.—*See* Tenant for Life and Remainderman.

Costs.

A proctor's lien for costs on a fund in court is not displaced by a garnishee order.—*The Jeff. Davis*, Law Rep. 2 Adm. & Ecc. 1.

See Award, 1.

Covenant.—*See* Specialty Debt; Vendor and Purchaser of Real Estate, 1.

Criminal Law.

A statute provided that whoever should steal, or cut with intent to steal, the whole or any part of any tree, or any underwood (in case the value of the article or articles stolen, or the amount of injury done, should exceed £5), should be guilty of felony. *Held*, that, in estimating the amount of injury done, the injury to two or more trees might be added together, provided the trees were cut at one time, or so continuously as to form one transaction.—*The Queen* v. *Shepherd*, Law Rep. 1 C. C. 118.

See Embezzlement; Malicious Wounding.

Custom.

One who employs a broker to sell shares for him on the Stock Exchange or other general market, impliedly authorizes him to deal according to the general and known usages of that market, though he himself be not aware of their existence. But the usage relied on must be proved to exist, and to be so general and notorious, that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it; and, to bind persons not aware of it, it must also appear to be reasonable.—*Grissell* v. *Bristowe*, Law Rep. 3 C. P. 112.

Cy près.—*See* Will, 2.

Damages.

Where, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, though the buyer cannot recover, as damages for non-delivery according to the contract, the loss of profit which might have been made from the purpose for which he intended it, he can recover the loss of profit which might have been made from the purpose supposed by the seller, provided he has actually sustained damage to that or a greater amount.—*Cory* v. *Thames Iron Works Co.*, Law Rep. 3 Q. B. 181.

See Banker; Company, 2; Contract, 1; Patent; Pleading; Vendor and Purchaser of Real Estate, 2; Warranty.

Debenture.—*See* Company, 1.

Deed.—*See* Parol Evidence; Power.

Devise.—*See* Will.

Discovery.—*See* Equity Pleading and Practice, 1; Production of Documents.

Discretion.—*See* Club.

Divorce.—*See* Husband and Wife, 2.

Election.

A testator, in pursuance of a power, appointed a fund to his three daughters, who were objects of the power, in equal shares: he gave his residuary personal estate to the same daughters in equal shares, and he directed the share of each daughter under the will and appointment to be held in trust for her for life, remainder to her children; such children were not objects of the power. *Held*, that the daughters took absolute interests in the appointed fund, and that no case of election was raised against them in favor of their children.—*Churchill* v. *Churchill*, Law Rep. 5 Eq. 44.

Embezzlement.

A statute provides that it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security, and that such allegation shall be sustained, if the offender shall be proved to have embezzled any amount; though the particular species of coin or valuable security of which such amount was composed shall not be proved. *Held*, that, under this statute, an allegation of the embezzlement of money was not sustained by proof that a cheque only had been embezzled, if there was no evidence that the prisoner had cashed it.—*The Queen* v. *Keena*, Law Rep. 1 C. C. 113.

Equity.—*See* Mistake; Partnership.

Equity Pleading and Practice.

1. To a bill by the United States, praying an account of all moneys received by the de-

fendant as agent in England of the so-called Confederate States, and for consequential relief, the defendant pleaded to the whole of the discovery and relief, that, by an act of Congress, the property of all agents of the Confederate Government was liable to confiscation, and that proceedings *in rem* were pending in the United States to confiscate his property on the ground of such agency. *Held*, that the plea was good as to the discovery, but bad as to the relief.—*United States* v. *McRae*, Law Rep. 3 Ch. 79.

2. To set aside for fraud a decree signed and enrolled, actual, positive fraud must be shown. Mere constructive fraud is not sufficient,—at all events after long delay.—*Patch* v. *Ward*, Law Rep. 3 Ch. 203.

3. A solicitor, acting on behalf of his client, contracted to pay the plaintiff a certain sum, such sum to be a charge on the client's land. The plaintiff filed a bill against the client and solicitor, alleging that the client was bound by the contract, but that the client denied that he was bound, on the ground that the solicitor had no authority to enter into such contract; and the bill prayed specific performance by the client, or otherwise, if it should appear that the solicitor was not authorized, then that the solicitor might be declared personally liable to perform the same. A demurrer by the solicitor was allowed, on the grounds, (1) that the plaintiff did not himself allege that the client was not bound; (2) that alternative relief could not be prayed against one defendant in case relief could not be obtained against another defendant; (3) that the remedy against the solicitor was at law.—*Clark* v. *Lord Rivers*, Law Rep. 5 Eq. 91.

See Contract, 2; Injunction.

Estate Tail.—*See* Tail, Estate in.

Evidence.—*See* Bill of Lading; Frauds, Statute of; Mistake; Necessaries, 2; Parol Evidence; Production of Documents; Stamp.

Executor and Administrator.—*See* Administration.

Executory Trust.

By deed it was agreed that A. should raise out of certain hereditaments £800, and invest the same in the names of trustees on trusts to be declared for the benefit of R. for her life, remainder to her children, and as to R. for her separate use, and with all the powers for maintenance, and other powers and trusts usually inserted in a money settlement of the like nature, and, till such declaration should be made, A. to retain the £800 upon the like trust. No subsequent declaration of trust was ever made. *Held*, that the deed was executory only, and that the settlement so directed ought to have limited the £800, after the death of R., amongst the children as tenants in common, and not as joint tenants.—*Mayn* v. *Mayn*, Law Rep. 5 Eq. 150.

Factor.

Cotton was consigned for sale by A. to B. B. deposited the bill of lading with C., and authorized him to receive and sell the cotton, and subsequently made a further pledge to D. of the balance of the net proceeds of the cotton by written order, assented to by C. *Held*, that the pledge to D. was valid as against A. under the Factor's Act (5 & 6 Vic. cap. 39).—*Portalis* v. *Tetley*, Law Rep. 5 Eq. 140.

Fixtures.

Looms put up by the lessee of a mill during his term, and fastened to the floor by nails driven through the loom feet into wooden plugs fitted into the stone floor, are, though easily movable without injury to the freehold, fixtures which pass under an assignment of "the mill, fixed machinery, and hereditaments, with all looms and other machinery, fixed or movable," without the registering of the assignment under the 17 & 18 Vic. cap. 36, which requires all assignments of chattels to be registered.—*Boyd* v. *Shorrock*, Law Rep. 5 Eq. 72.

Foreign State.—*See* Equity Pleading and Practice, 1.

Forfeiture.—*See* Equity Pleading and Practice, 1

Frauds, Statute of.

On a purchase of flour, J. W., an agent of the defendant, made the following entry in a book belonging to N.: "Mr. N., 32 sacks at 39*s*., to wait orders. J. W." In an action by N. for non-delivery of the flour, this entry was proved; and it was proved by parol evidence that N. was a baker, and the defendant a flour merchant; and a correspondence subsequent to the purchase was put in, relating to the delivery of the flour by the defendant to N. *Held*, that the entry was a sufficient memorandum to satisfy the Statute of Frauds; for that the parol evidence of the relative trades of the parties was admissible, and, independently of the correspondence, showed that the defendant was the seller, and N. the buyer, of the flour. *Vandenburgh* v. *Spooner*, Law Rep. 1 Ex. 316, considered.—*Newell* v. *Radford*, Law Rep. 3 C. P. 52.

Garnishee.—*See* Costs.

Husband and Wife.

1. The court will not settle the whole of a wife's fund on her and her children, where the husband is not insolvent, and has not been

guilty of adultery, cruelty or desertion. In determining the proportion to be settled, the court is bound by no fixed rule, but will exercise a judicial discretion, according to circumstances. The court refused to interfere with the husband's right to the fund in default of children, in case of his surviving his wife.—*In re Suggitt's Trusts*, Law Rep. 3 Ch. 215.

2. A woman, entitled to a fund in court, applied for a loan on the security of the fund. Before the transaction was completed, she married, and the money was advanced to her and her husband, who both joined in mortgaging the fund. The fund was then carried over to the joint account of husband and wife, and a stop put on it in favor of the mortgagee. In June, 1867, the wife obtained a decree *nisi*, for dissolution of the marriage, which became absolute in January, 1868. In the interval, the mortgagee presented a petition, on which an order was made by a vice-chancellor for payment of his debt out of the fund. *Held*, (1) that the mortgage did not bind the wife's right by survivorship, and that her pre-nuptial negotiation made no difference; (2) that the carrying over the fund to the account of husband and wife was not a reduction into possession by the husband; (3) that, on the decree for dissolution becoming absolute, it took effect from the date of the decree *nisi*, and so the order on the petition was of no avail to reduce the fund into possession.—*Prole* v. *Soady*, Law Rep. 3 Ch. 220.

See Bankruptcy, 1; Necessaries, 1.

Income.—*See* Tenant for Life and Remainderman.

Infant.—*See* Necessaries, 2, 3.

Injunction.

1. Proceedings in one suit in equity may be restrained by an injunction obtained in another suit.

If there are two claimants to a fund, and one files a bill against the holder of the fund without making the other a party, the holder of the fund may file an interpleader bill, and restrain the proceedings in the former suit.—*Prudential Assurance Co.* v. *Thomas*, Law Rep. 3 Ch. 74.

2. A local board of health withdrew its opposition to a railway bill on the insertion in the act of a clause that no bridge carrying a road over the railway in their district should have an approach with a slope of more than 1 in 30. To make such a slope required an encroachment on the land of a person who obtained an injunction to prevent such encroachment, and the company thereupon made the approach with a slope of 1 in 20. *Held*, that, to an information by the Attorney-General, it was no answer, that a slope of 1 in 30 could not be made without stopping the road, and a mandatory injunction was granted.—*Attorney-General* v. *Mid-Kent Railway Co.*, Law Rep. 3 Ch. 100.

3. The plaintiff, a maker of cocoa-nut matting, using chloride of tin in bleaching, complained that his fabrics were injured by reason of the chloride of tin being discolored by sulphuretted hydrogen thrown off from the adjoining factory of the defendant. The evidence showed that, owing to the defendant's precautions, on three occasions only had an appreciable escape taken place, and then only from accidental defects, which were immediately remedied. An injunction was refused, without prejudice to an action at law.—*Cooke* v. *Forbes*, Law Rep. 5 Eq. 166.

See Administration, 3.

Insurance.

A policy of fire insurance provided that the insurers would not be liable for loss or damage by explosion, "except for such loss or damage as shall arise from explosion by gas." In the insured premises, which were used for the business of extracting oil, an inflammable and explosive vapor, evolved in the process, escaped and caught fire, setting fire to other things. It afterwards exploded, and caused a further fire, besides doing damage by the explosion. *Held*, (1) that "gas," in the policy, meant ordinary illuminating gas; (2) that the exemption of liability for loss by explosion was not limited to cases where the fire was originated by the explosion, but included cases where the explosion occurred during a fire, and that the insurers were not liable either for the damage from the explosion, nor from that from the further fire caused by the explosion.—*Stanley* v. *Western Insurance Co.*, Law Rep. 3 Ex. 71.

Interpleader.—*See* Injunction, 1.

Joint Tenancy.—*See* Executory Trust.

Jurisdiction.—*See* Admiralty; Equity.

Landlord and Tenant.

1. By a statute, the occupier of premises may deduct out of the rent due in respect of the premises the money which he pays to the vestry for works done by them under the statute. *Held*, that the money could not be deducted unless actually paid; and therefore that a distress for rent which became due after service of a notice from the vestry, made before payment to the vestry, was not illegal.—*Ryan* v. *Thompson*, Law Rep. 3 C. P. 144.

2. The lessee of premises covenanted to pay "all taxes, rates, duties and assessments what-

ever, which during the term should be taxed, assessed or imposed on the tenant or landlord, in respect of the premises demised." The parish vestry, having paved the street on which the premises abutted, assessed the sum payable by the owner as his proportion of the estimated expenses thereof, gave the occupier a notice, under the 25 & 26 Vic. cap. 102, sec. 96, requiring him to pay it, and, on his failure to do so, took proceedings against the owner, and compelled him to pay. *Held*, that the owner could recover from the tenant the amount paid.—*Thompson* v. *Lapworth*, Law Rep. 3 C. P. 149.

Larceny.—*See* Criminal Law.

Legacy.—*See* Will.

Letter of Credit.—*See* Contract, 1.

Lex Loci.—*See* Conflict of Laws.

Liquidated Damages.—*See* Vendor and Purchaser of Real Estate, 2.

Malicious Wounding.

A prisoner may be convicted under a statute punishing the malicious "wounding" of cattle, though the wound was inflicted by the prisoner's hands, without any instrument.—*The Queen* v. *Bullock*, Law Rep. 1 C. C. 115.

Married Woman.—*See* Husband and Wife.

Mistake.

A renewed bill of exchange was drawn out, with a blank for the drawer's name, by an agent of the plaintiff, who, by mistake, inserted, above the place where the drawer's name was afterwards inserted, the name of the plaintiff; the signatures of the drawer and acceptor were afterwards added, and the bill indorsed to the plaintiff; the plaintiff sued the drawer at law, and, on the defendant pleading that the plaintiff's name appeared as drawer on the bill, the plaintiff filed a bill in equity for rectification. A demurrer to this was overruled, (1) on the ground that evidence to prove the real contract was not admissible at law, and (2) on the ground of the established jurisdiction of equity to correct mistakes.—*Druiff* v. *Lord Parker*, Law Rep. 5 Eq. 131.

See Will, 1.

Mortgage.—*See* Parol Evidence; Ship, 2; Specialty Debt.

Necessaries.

1. The legal expenses of a deserted wife, (1) preliminary and incidental to a suit for restitution of conjugal rights; (2) in obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement; (3) in obtaining advice as to the proper mode (*a*) of dealing with tradesmen who were pressing her to pay for necessaries supplied to her since she was deserted, and (*b*) of preventing a threatened distress on her husband's furniture in the house she occupied, are necessaries for which she can pledge her husband's credit.—*Wilson* v. *Ford*, Law Rep. 3 Ex. 63.

2. The plaintiff sold to the defendant, a minor, a pair of jewelled solitaires, which might be used as sleeve buttons, worth £25, and an antique silver goblet, worth £15, which last the plaintiff knew the defendant intended for a present. The defendant was the younger son of a deceased baronet, with no establishment of his own, and an allowance of £500 a year. In an action for the price of these articles, the question whether they were necessaries was left to the jury, who found that they were. *Held* (by Kelly, C.B., and Channell and Pigott, BB.), that the question was rightly left to the jury, but that the finding as to the goblet was wrong, and that therefore there ought to be a new trial. Per Bramwell, B., that neither article was a necessary, and that both findings were wrong.

At the trial, the defendant offered evidence, that, when he bought the solitaires, he was already sufficiently provided with similar articles; but he did not offer to show that the plaintiff knew the fact. *Held*, that the evidence was properly rejected.—*Ryder* v. *Wombwell*, Law Rep. 3 Ex. 90.

3. Unless special circumstances are shown, tobacco is not a necessary to any infant.—*Bryant* v. *Richardson*, Law Rep. 3 Ex. 93, note.

Notice.—*See* Priority; Sale.

Nuisance.—*See* Injunction, 3.

Parol Evidence.

The plaintiff mortgaged goods to the defendant, to secure the payment of £62 by instalments of £5 on Monday, May 22, and on each succeeding Monday till the whole was paid. The mortgage deed provided, that, if the mortgagor should make default in payment of the said £62, or any part thereof, when and as the same should become due and payable, the mortgagees might take possession of the goods and sell them. In an action against the defendant to recover the value of the goods which he had taken and sold for an alleged default in payment, the plaintiff offered parol evidence to show, that, the previous instalments having been paid, on Monday, August 28, the plaintiff asked the defendant to wait payment till Sept. 11, when she would pay £6; the defendant assented, and, on September 11, the plaintiff tendered the money, but the defendant had previously taken the goods. *Held*, that the parol

evidence was admissible, and showed that there had been no "default," within the meaning of the deed.—*Albert* v. *Grosvenor Investment Co.*, Law Rep. 3 Q. B. 123.

See Frauds, Statute of; Mistake.

Parties.

C. & Co., merchants in Spain, gave one J. a power of attorney to sell certain mines belonging to them, J. to receive half of the price obtained above a certain amount. J. contracted to sell the mines to the defendant company by an agreement purporting to be made between "J., acting for himself, and also, under a letter of attorney, for A., B. and C., all three co-proprietors with him of various mines, and in co-partnership with him under the style of C. & Co.," of the one part, and the defendants of the other part. In the body of the agreement, C. & Co. were described as "the vendors," and the vendors were to give a good title to the mines. The agreement was signed by J., "for self and partners," and was sealed with the defendants' seal. *Held*, that J. alone could not maintain an action for breach of the agreement, but that A., B. & C. must be joined as plaintiffs.—*Jung* v. *Phosphate of Lime Co.*, Law Rep. 3 C. P. 139.

Partnership.

The plaintiff, being entitled to a fund in court, gave the firm of solicitors who had acted for him in the matter a joint and several power of attorney to receive the money. The plaintiff was in the habit of addressing his letters to B., one of the firm, individually, and not to the firm, and he sent the power addressed to B., who, under it, received the money, signed the receipt in his own name, paid the money into his private bank account, and soon after absconded with it. On a bill seeking to make S., the other partner, liable to repay the money, but not praying an account, *held*, (1) that there was jurisdiction at equity, though there might be also at law; and (2) that a decree should be made that S. should repay the amount with interest.—*St. Aubyn* v. *Smart*, Law Rep. 5 Eq. 163.

See Club.

Patent.

A patentee of an invention applicable to part of a machine, who, himself a manufacturer, has been in the habit of allowing other manufacturers to use his invention, on payment of a fixed royalty for each machine, having obtained against an infringing manufacturer a decree (amongst other things) for damages "by reason of the user or vending" of the invention, cannot claim, by way of damages, a manufacturing profit, in addition to his ordinary royalty; and certain persons (not being manufacturers) who had used unlicensed machines, fitted by the defendant with the invention, having paid the plaintiff his ordinary royalty, no further royalty in such cases can be recovered from the defendant.—*Penn* v. *Jack*, Law Rep. 5 Eq. 81.

Payment.—*See* Sale.

Penalty.—*See* Vendor and Purchaser of Real Estate, 2.

Pilot.—*See* Collision.

Pleading.

To a declaration for goods sold and delivered, claiming £120, the defendant pleaded: 1. Never indebted; 2. "And for a further plea," that after the commencement of the suit, and after the last pleading, it was agreed that the plaintiff should accept from the defendant £60 in settlement of the debt sought to be recovered in the action; and the defendant paid and the plaintiffs accepted £60 in satisfaction and discharge of their said debt. On demurrer to the second plea, *held*, that the plea, being pleaded generally, must be taken to be pleaded to the whole causes of action; and as it alleged the payment, after action brought, to have been in satisfaction of the debt only, it was bad for leaving unanswered any damages to which the plaintiffs might be entitled.—*Ash* v. *Pouppeville*, Law Rep. 3 Q. B. 86.

See Equity Pleading and Practice; Parties.

Pledge.—*See* Factor.

Power.

A testator gave an estate on trust for sale the proceeds to be held on such trusts as his widow—by deed or instrument sealed and delivered before his youngest child should attain twenty-five years—should appoint, and, in default, for his children (except the eldest son) equally. The widow, by will, executed before the youngest child attained twenty-five, appointed the estate by name to the eldest son. She died after the youngest child attained twenty-five. *Held*, that the will, having come into operation after the prescribed period, could not take effect as an appointment under the power; and that this was not such a defective execution as would be aided in equity.—*Cooper* v. *Martin*, Law Rep. 3 Ch. 47.

See Election.

Practice.—*See* Equity Pleading and Practice.

Principal and Agent. — *See* Custom; Equity Pleading and Practice, 3; Factor.

Priority.

Formal notice to the trustee of a fund, in which an insolvent is interested, is necessary to give the assignee in insolvency priority over

subsequent incumbrancers who have given notice. Knowledge of the insolvency, acquired *aliunde* by the solicitor of the trustees, is insufficient to give priority to the assignee.—*In re Brown's Trusts*, Law Rep. 5 Eq. 88.

See Costs.

Proctor.—*See* Costs.

Production of Documents.

To an action of executors to recover damages for the death of their testator, caused by the alleged negligence of the defendants, the defendants pleaded not guilty, and that the deceased had accepted £75 in discharge of all claims against them. The defendants had sent a clerk and their medical officer to see the deceased, ascertain his state, and negotiate as to the compensation to be made him. *Held*, that the plaintiffs were entitled to have inspection and copies of the reports made to the defendants by these officers of their interviews with the deceased.—*Baker* v. *London & S. W. Railway Co.*, Law Rep. 3 Q. B. 91.

Proximate Cause.—*See* Insurance.

Railway.—*See* Company, 2; Injunction, 2.

Sale.

The plaintiff sold to the defendants goods, to be paid for in cash or "approved bankers' bills." The defendants paid for them by an "approved banker's bill." The bill was subsequently dishonored. The defendants were not parties to the bill, and received no notice of dishonor. In an action for the price of the goods, *held*, that the defendants' liability was not more extensive than it would have been had they indorsed the bill, and that they were therefore discharged, not having received due notice of dishonor.—*Smith* v. *Mercer*, Law Rep. 3 Ex. 51.

See Custom: Damages; Frauds, Statute of; Vendor and Purchaser of Real Estate; Warranty.

Set-off.—*See* Administration, 1.

Share.—*See* Contract, 2; Tenant for Life and Remainderman.

Shelley's Case, Rule in.—*See* Will, 2.

Ship.

1. A. engaged to serve on a ship as a seaman, for a long voyage out and back. The captain having died soon after the ship sailed, the first mate assumed the command, appointed A. second mate, and agreed that he should receive the pay of a second mate. The ship subsequently touched at several ports, and returned home, A. continuing to act as second mate. *Held*, that the agreement with A. was binding on the ship-owners.—*Hanson* v. *Royden*, Law Rep. 3 C. P. 47.

2. A., the owner of a ship, mortgaged it to B., and afterwards, with B.'s acquiescence, agreed with C. that C. should work the ship for A. till further notice, paying all expenses and receiving all profits; A. to indemnify C. against loss, if any, on a periodical statement of accounts. After this agreement, B. notified C. of the mortgage, and demanded possession. The ship was then at S., under engagements by C. with third parties for a voyage. At the end of the voyage, the ship was given up to B. At the time of the delivery, C. owed the crew a large sum for wages; to recover which, soon after the delivery, the crew proceeded against the ship in the Admiralty Court, and the ship was seized by the officers of the Court. B., after much delay and loss, paid the wages and obtained possession of the ship. In an action of trover and for money paid, brought by B. against C., *held*, (1) that C. was entitled to keep possession till the end of the voyage, in order to fulfil the engagements entered into before notice; (2) that, as there had been a delivery of the ship, notwithstanding it was subject to a lien for wages, B. could not recover in trover; but (3) that B. could recover the amount of the wages under the count for money paid.—*Johnson* v. *Royal Mail Steam Packet Co.*, Law Rep. 3 C. P. 38.

See Admiralty; Award, 2; Collision.

Signature.

The 6 Vic. cap. 18, sec. 17, requires the notice of objection to a voter to be "signed by the person objecting." An objector affixed his name to the notice of objection by a stamp, on which was engraved a *fac simile* of his ordinary signature. *Held*, a sufficient signing.—*Bennett* v. *Brumfitt*, Law Rep. 3 C. P. 28.

Solicitor. — *See* Costs; Equity Pleading and Practice, 3; Necessaries, 1; Partnership.

Specialty Debt.

A mortgage deed, made to secure an antecedent debt, recited the debt, and contained a proviso for redemption and a power of sale, but no covenant to pay the debt or interest. The mortgaged estate was insufficient to cover the debt. *Held*, that the deed did not convert the debt into a specialty debt.—*Isaacson* v. *Harwood*, Law Rep. 3 Ch. 225.

Specific Performance.

A person agreed to purchase a leasehold house for his own residence, and contracted that he should have possession by a certain day. The vendor, though he tendered possession, failed to show a good title by the day named. *Held*, (1) that "possession" must be understood to mean possession with a good

title shown; (2) that time was of the essence of the contract, and that a bill by the vendor for specific performance should be dismissed.—*Tilley* v. *Thomas*, Law Rep. 3 Ch. 61.

See Contract, 2; Equity Pleading and Practice, 3.

Stamp.

A deed assigning a debtor's property may be given in evidence as proof of an act of bankruptcy, though not stamped. — *Ponsford* v. *Walton*, Law Rep. 3 C. P. 167.

Statute.

1. The 30 & 31 Vic. cap. 142, sec. 10, enacts that, on the affidavit of a defendant in an action of tort, brought in a superior court, that the plaintiff has no visible means of paying costs, either the plaintiff must give security for costs, or the cause shall be remitted to the county court. *Held*, that the statute was retrospective, and applied to an action commenced before its passage. — *Kimbray* v. *Draper*, Law Rep. 3 Q. B. 160.

2. In 1854, W., as surety, joined in a bond with C. In July, 1856, was passed the 19 & 20 Vic. cap. 97, which provides, in sec. 5, that every surety for the debt of another, who shall pay such debt, shall be entitled to have assigned to him any security held by the creditor in respect of such debt, and to stand in the place of the creditor. In December, 1856, the condition of the bond was broken, and W. paid the amount due on it. *Held*, that W. was entitled to rank as a specialty creditor of C.—*In re Cochran's Estate*, Law Rep. 5 Eq. 209.

Statute of Frauds.—*See* Frauds, Statute of.

Survivorship.—*See* Will, 3.

Tail, Estate in.

Testator devised all his estate of land, situate, &c., to his wife for life, and after her death to his daughter M., "to her and her children forever." At the date of the will, and of the testator's death, M. had no children born, but at those times she was *enceinte* of a child who was born after the testator's death. *Held*, that M. took an estate tail.—*Roper* v. *Roper*, Law Rep. 3 C. P. 32.

See Will, 2.

Tax.

Commissioners were incorporated with powers to construct a bridge, and to borrow from the Treasury £120,000 on an assignment of the tolls: they were authorized to take tolls, to be applied to pay the expenses of the bridge, and then in repayment of the sum borrowed. *Held*, that they were not liable to the poor-rate, as they were in occupation of the bridge as servants of the crown, deriving no benefit from the tolls, and therefore exempt from the operation of 43 Eliz. cap. 2, sec. 1.—*The Queen* v. *McCann*, Law Rep. 3 Q. B. 141.

Tenant for Life and Remainderman.

Shares in a company were given on trust to pay A during her life "the interest, dividends, share of profits, or annual proceeds," and after her death over. The articles of the company provided, that, out of the half-yearly profits, a dividend might be declared and a sum reserved for contingencies. During A.'s life, three new shares were added to those held in trust, pursuant to a vote of the company to apply a portion of the earnings during the half-year to necessary works, and issue new shares to represent the money so applied, a dividend being declared out of the remainder. *Held*, that the new shares were capital, not income as between A. and those in remainder.—*In re Ezekiel Barton's Trust*, Law Rep. 5 Eq. 238.

Tenant in Common.—*See* Executory Trust.

Trover.—*See* Ship, 2.

Trust.—*See* Charity; Executory Trust; Priority; Vendor and Purchaser of Real Estate, 1.

Usage.—*See* Custom.

Vendor and Purchaser of Real Estate.

1. If trustees of real estate are empowered to sell by the direction of the tenant for life, upon a sale under the power, the tenant for life must enter into the ordinary covenants for title.—*Earl Poulett* v. *Hood*, Law Rep. 5 Eq. 115.

2. An agreement to purchase a house provided as follows: "As earnest, the purchaser has paid to the vendor £50, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfil the same on his part, he shall return the deposit, in addition to the damages hereinafter stated; and if the purchaser shall fail to perform his part, then the deposit shall become forfeited in part of the following damages; and if either of the parties neglect or refuse to comply with any part of this agreement, he shall pay to the other £50, hereby mutually agreed on to be the damages ascertained and fixed, on breach hereof." Instead of depositing the £50, the purchaser gave an I.O.U. for the amount. The purchaser failed to complete the purchase, and the vendor sold the house for £10 less than the purchaser agreed to pay. In an action by the vendor against the purchaser for breach of the agreement and on the I.O.U., *held*, that the plaintiff was not limited to the amount of damage actually sustained, but

might recover the £50. *Semble*, that, except for the clause of the forfeiture of the deposit, the £50 would have been a penalty and not liquidated damages.—*Hinton* v. *Sparkes*, Law Rep. 3 C. P. 161.

See Specific Performance.

Warranty.

Under a contract to sell certain described goods, which the buyer has no opportunity of inspecting, the goods must not only answer the description, but must be salable or merchantable under that description. The plaintiffs, at Liverpool, contracted with the defendant to purchase a quantity of Manilla hemp, to arrive from S. by certain ships. The ships arrived, and the hemp was delivered to the plaintiffs and paid for; on examination, it was found that the bales had been wetted through with salt water, afterwards unpacked and dried, and then repacked and shipped at S. The hemp retained its character of hemp, but it was so damaged as not to be "merchantable." The defendant did not know the state in which the hemp had been shipped at S. The plaintiffs sold the hemp at auction as "Manilla hemp, with all faults," and it realized seventy-five per cent. of the price which it would have brought if undamaged. *Held*, that there was an implied warranty to supply Manilla hemp, of the particular quality of which the bales consisted, in a merchantable condition, and that the plaintiffs were entitled, as damages, to the difference between the value of the hemp when it arrived, and what would have been its value if it had been shipped in a state in which it ought to have been shipped —*Jones* v. *Just*, Law Rep. 3 Q. B. 197.

Wife's Equity.—*See* Husband and Wife, 1.

Will.

1. J. L., by will, dated in 1849, gave the interest of a fund to Charlotte Lee, but if she should marry, or die unmarried, then over. Charlotte Lee was the maiden name of J. L.'s daughter. She had been married in 1828. J. L. knew of her marriage, but it was not shown under what circumstances. Charlotte's husband had, in 1849, not been heard of for many years. After J. L.'s death, the husband appeared, and, on Charlotte's death, claimed the fund. *Held*, that it sufficiently appeared that J. L. believed his daughter's husband to be dead, that he intended that no husband of hers should be benefited by the fund, and that accordingly on her death it went over. —*Crosthwaite* v. *Dean*, Law Rep. 5 Eq. 245.

2. Testator declared that his property should be inherited by his nephews, A. and B., during their lives, and, after their death, that their eldest sons should inherit the same during their lives, and so on,—the eldest son of each of the two families to inherit the same forever. *Held*, that A. and B. took estates for their lives, remainder to their eldest sons respectively for their lives, remainder to A. and B. in tail male—*Forsbrook* v. *Forsbrook*, Law Rep. 3 Ch. 93.

3. Gift of an annuity to the child or children of A. equally, for the term of their joint lives, or the life of the survivor or longer liver of them. *Held*, that the children took, as tenants in common, an annuity to last till the death of the survivor, and that the share of those dying within the period went to their representatives —*Bryan* v. *Twigg*, Law Rep. 3 Ch. 183.

4. Bequest to the descendants of the brothers and sisters of A., living at testator's death, "such descendants to take *per stirpes*, and not *per capita*." *Held*, that the fund was primarily divisible into as many equal shares as there were brothers and sisters of A. of whom any descendant was living at the testator's death; that such shares respectively were divisible into as many equal shares as there were children of such brothers and sisters of A. respectively living at testator's death, or having died and left any descendant then living, and so on; and that no descendant should share concurrently with a living ancestor.—*Gibson* v. *Fisher*, Law Rep. 5 Eq. 51.

See Administration; Charity; Power; Tail, Estate in.

Words.

"*Damage*."—See Admiralty.
"*Default*."—See Parol Evidence.
"*Explosion*."—See Insurance.
"*Gas*."—See Insurance.
"*Money*."—See Embezzlement.
"*Per stirpes and not per capita*."—See Will, 4.
"*Possession*."—See Specific Performance.
"*Signing*."—See Signature.
"*Wound*."—See Malicious Wounding.

GENERAL CORRESPONDENCE.

To the Editors of the Canada Law Journal.

Conveyancing—Uniformity of charges—Quack conveyancers.

Messrs. Editors,—I do not recollect to have seen any article in your Journal on the subject of conveyancing in Ontario. I propose to offer a few remarks on the subject, referring to conveyancers (meaning lawyers) and their charges. It is well known to the profession that there is no statute in force in Ontario

directly regulating the responsibility—the *licensing* or *fixing*—of the charges of conveyancers, as such.

The business of conveyancing is incidental to that of the practice of the law among lawyers, and is a large perquisite among the profits of a class not lawyers. It is discretionary now with lawyers to charge just what they think proper. The laity who act as conveyancers work *very cheap* generally, and are under *no responsibility, legally*, to do their work correctly. On the other hand, lawyers are legally responsible for correct searches and conveyances. Many think this state of things wrong, and I do myself; for a person taking the money of another for legal work ought to have skill and knowledge, and be responsible for palpable mistakes. I will refer to this part of the subject again. It may not be very generally known that the members of the bar of two of the leading cities of Ontario—Hamilton and Toronto—in or about 1855 established a tariff of charges relating to conveyancing and kindred subjects, for work not included in the table of fees established in the Common Law Courts. Such was the case. This tariff is followed by some (it should be by all) professional men. I think a uniformity of practice should exist in this matter, and a uniformity of responsibility among conveyancers should be maintained. The case of *Ross* v. *Strathy*, reported in the December number of your U. C. L. J. for 1858, page 277, shows how closely the law scans the conduct of lawyers in investigating titles. Mr. Strathy narrowly escaped a heavy verdict for not searching the treasurer's office for tax liens. I think, too, that a *purely conveyancing* bill should be liable to taxation in Canada, which, however, is not the case. In England such a bill can be referred; but in Canada it cannot, as was expressly decided by Mr. Justice Burns in the case of *Re Lemon & Peterson*, two, &c., reported in your July number of the U.C.L.J. for 1862. There had been other cases before this, in which it was decided that, where conveyancing charges are mixed in with law charges, for business done in courts, they can be taxed. See *In re Eccles*, U. C. L. J. for March, 1860; *Exparte Glass*, U. C. L. J. for April, 1868.

But the practice seems different in England. I believe that Mr. Hemings, the Chancery taxing officer, will tax conveyancing charges according to the tariff I have alluded to.

In England (as I understand it) conveyancing is a regular branch of the legal profession, and not as in Canada, where any one may act as conveyancer and, I presume, recover reasonable compensation for his work. Schoolmasters, magistrates, clerks of Division Courts, and (until the Act of last Session) registrars, members of Parliament, township officers and some others, have monopolized the principal part of the conveyancing business in this country. In towns and cities it has not been so. Special conveyances have generally been drawn by lawyers. Efforts have been made to get a law passed by our Canadian legislature to give this business to lawyers exclusively; but the effort has failed, the legislature not being willing even to make the laity following the business of conveyancing responsible, legally, for their mistakes. But I think the time will soon come when our Ontario legislature will (as they certainly should) give the legal professidn the entire business of conveyancing, and a tariff with it. At all events, conveyancers should take out a license, and be held legally responsible for errors in their work.

I have for many years, in Canada, been in the habit of noticing the style of conveyances, particularly deeds, leases, wills, partnership deeds, chattel mortgages and agreements, written by the persons above named (not lawyers), and the errors in form, want of proper covenants, erasures, interlineations and other defects observable in, perhaps, a majority of the papers, were very great, and often ludicrous in the extreme. Of course such errors and defects are sure to cause law-suits, and it is often said that it is a question whether lawyers do not make more by the mistakes than they would by the exclusion of such persons as are unlearned from drawing them. In this case, however, the public have a right to be protected, as they have to be from mere *quacks in medicine* or unskilful physicians.

In none of the American States have the Legislatures ever passed a law giving peculiar privileges to lawyers as conveyancers, and the popular prejudice is the same in Canada. Indeed, Canadians are in many things essentially a democratic people. One can see no reason, however, why even in a democracy, *pro bono publico*, the community should not be protected from *cheats*, from persons taking their money for doing work that they cannot under-

General Correspondence.

stand—at least, why they should not be responsible for legal errors.

Now, I chiefly commenced this letter with a view of trying to fix the attention of the profession upon the necessity of having some uniform understanding as to charges for conveyances. I think "A," a lawyer, has no right—no legal or moral right—because he is the next-door neighbor of "B," another lawyer, to charge only $4 for drawing two long *farm leases*, or $4 for drawing two deeds and affidavits, and so on, when "B," following a tariff fixed on by the profession, charges $4 for one lease or deed. I say it is wrong for the members of the profession to be *beating each other down* at the instance of some niggardly client, who will go *from office to office* to see in which he can get his work done the cheapest. There should be a *known* and *uniform* standard of charges; it is the interest of all practicing lawyers that it should be so, just as it is with the medical men to observe their tariff. And if medical men can receive their fees why not lawyers theirs, in cases not provided for by law? If all adopt the tariff it is the duty of courts of law to allow such charges to be recovered upon a "*quantum meruit*." At common law no costs are allowable at all; then in all cases where professional men, or persons performing duties or works requiring skill, are employed, they certainly have the right to meet and fix a tariff of charges, and those persons who employ them are, after a reasonable time, presumed to know their charges.

In some of the Western American States the tariff of lawyer's charges is fixed on this principle in all the courts.

The tariff charges established by the members of the legal profession in Hamilton, at a meeting held at Norton's hotel on the 28th September, 1855, over which Wm. Proudfoot, Esq, presided as chairman, and Wm. Leggo, Esq., as secretary, fixes the amounts the profession are to charge for business not included in the ordinary tariff fixed by the Judges. About the same time a similar tariff—or somewhat similar, a copy of which I have not been able to find—was established by the bar in Toronto. These tariffs relate to conveyancing in all its branches, searches in the registry office, counsel fees at Courts of Oyer and Terminer, at the Quarter Sessions and Recorders' Courts, Courts of Appeal, County Courts, Courts of Probate and Surrogate, Police Court, Division Court, for advice, and for commission and business done in Parliament as lawyers. Since that time, in some of these courts—for instance in the Surrogate Court—a tariff of fees has been established for lawyers, and also in the Bankrupt Court. I do not propose (at least in this letter, which is already too long) to allude at length to the items of these tariffs, but will only refer to a few. For instance, I find that the Hamilton tariff allows $4 for every common deed, and one-half for all duplicates. It allows $1 for all common affidavits, including attendance and commissioner; and for every special affidavit, per folio of 72 words (the English way of calculating folios) 20 cents per folio. At this rate, a common deed would now cost not less than $7, including duplicate and affidavits; and if an extra affidavit, $1 more. A charge of 50 cents is made for every attendance at a public office, and every special attendance $1 in the city, and if out of the city, $2, to be increased $1 for every extra hour where more than one mile out of the city. It charges $1 for every letter and attendance upon special matters. For every common bond for a deed, or to secure money, $4. For a lease with ordinary covenants, $4—copies extra. For common chattel mortgage and affidavits, $6. For certificate of mortgage, $3, including affidavit. Fee on every examination of title, per hour, $1. Instructions for special conveyance, $2. Drafting special conveyances, per folio, 30 cts. Engrossing same, 15 cents per folio, on paper; on parchment, 25 cents. Fee on settling same, $2, to be increased if very long or important. Fee on settling same with opposite counsel, $5, to be increased in intricate cases. Opinion on validity of title, $5, to be increased if important case. Entering satisfaction on judgment, &c., $4. Advice in no case less than $2, to be increased to $10 if case important.

Now, just looking at these few charges, how many lawyers, it may be asked, are governed by the tariff? Not long since a person in Toronto called upon a lawyer to draw two farm leases, of five year's duration, for a large farm, and was told the charge would be six dollars, including a short bond to secure rent. The applicant or client turns upon the lawyer and says: "*I can get it done for four dollars by a certain firm of lawyers.*" Not long since, in Toronto, two long leases, for a property worth ten thousand dollars, were drawn, with

special covenants, amounting in length to about sixty folios, and it was objected that, in such a case, instructions, consultation fee, &c., should not be allowed; and about one-half the sum chargeable by the Hamilton tariff was only allowed by a professional man, who is a large practitioner! If, in such cases, each professional man is to charge what he pleases —is to *beat down* the prices of his fellow-practitioners—and, in other words (to use a vulgar phrase), act upon the "*dog eat dog*" system, conveyancing, which ought to be an honorable and remunerative part of a lawyer's business, will be degraded.

I wish to see fair and remunerative prices paid for conveyancing, and a tariff of charges, such as the Hamilton tariff, complied with. This is the more needed now, since titles are becoming more intricate, property more valuable, and the "collecting" system is dwindling away.

C. M. D.

Toronto, July 17, 1868.

[We have had occasion frequently to refer to the unsatisfactory state of the law in this Province, as to conveyancing, and have expressed views in great part in unison with those of our correspondent. In the *Law Journal*, at as early a period as 1859, under the heading "Liability of persons practising as conveyancers," we pointed out that in respect of property as well as health, the quack is often preferred to the educated practitioner, and suggested that none but licensed conveyancers should be allowed to draw deeds or instruments for fee or reward. We, in the *Law Journal* for February, 1859, under the heading "Conveyancing fees," also argued for a uniform tariff. In the *Law Journal* for December, 1861, under the heading "*Ne sutor ultra crepidam*," we pointed out the penny wise and pound foolish consequences of the present system, or rather want of system. In the *Journal* for October, 1864, p. 279, we demanded legislation of some kind not merely for protection of the profession, but of the public, and by reference to p. 277 of the same volume, our correspondent will also find that Judge Hughes, much to his credit, in a case before him, is reported to have said, "It is much to be regretted that no means are provided to protect the public or that the public will not protect themselves against those persons who exist in every community, invading the rights of the legal profession, by presuming to act as legal advisers, conveyancers, &c., to and for ignorant people. Their acts and ignorance to such, lead to great losses and hardships, and very often to inextricable difficulties which are ever the fruitful sources of litigation and trouble." Now that we have a local house for the Province of Ontario, containing several members of the profession, who are fully alive to the importance of legislation on the subject, it is hoped that another session will not be allowed to pass, without some attempt being made to provide the legislation required.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—I take the liberty of writing to you for information on the following points:

The attorney for the defendant, in an action in the County Court, has the plaintiff's declaration set aside as being irregular, by order of the judge, with costs of the application to be paid by the plaintiff.

Without service of the bill of costs, or notice of taxation, an allocatur is served upon the plaintiff's attorney, certified by the Clerk of the County Court; *but no demand of payment is made.*

Subsequently the defendant's attorney has the order setting aside the declaration made a "rule of court," with further costs to be paid by the plaintiff.

The affidavits in support of the motion as filed do not state that any demand has been made for payment of the costs of setting aside the declaration, but merely that the costs have been taxed at a certain sum, and the order disobeyed, as no payment has been made.

Quære? Must not the affidavits show that a demand has been made for payment of the costs of setting aside the declaration, before further costs can be inflicted of making the order a rule of court? In *Thompson* v. *Belling*, 11 M. & W. 360, Parke, B., says, "The costs that were due under the judge's order were *demanded* of the proper party, and not paid by him." And in *R.* v. *Jamieson*, 6 M. & W. 603, "a *demand* was made." In Arch. Ch. Practice, 1508, are other cases cited, which I am unable to lay my hands on at present.

Our judge, of Kent, William B. Wells, intimates that he will grant a rule to show cause why so much of the rule of court as relates to costs should not be rescinded; but he

would advise me not to incur further costs, as he will certainly discharge it.

However, preferring to take the advice of the *Law Journal* as to what is law on the subject, I write for the necessary information.

I may state that the plaintiff was always ready and willing to pay the costs of the application to set aside the declarations (there being two cases) whenever a demand was made; but he objects to paying $20 more for making the order a rule of court, as taxed against him, in both cases.

Yours truly, G. O. Freeman.

Chatham, Aug. 3, 1868.

[Costs can only be given, in such a case, "provided an affidavit be made and filed that the order has been served on the party, his attorney or agent, and *disobeyed*." (Har. C. L. P. A. 649, Rule 129). If a judge's order have not been disobeyed at the time it is made a rule of court, the court must rescind so much of the rule as relates to the costs of making the order a rule of court. (2 Chit. Prac. 11th ed., 1595, 1596.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—I inclose the following as a case that has really arisen, for your consideration and judgment, trusting you will kindly answer the same.

A. owned lot 7 in the 4th concession, township of ——, through or rather across which has been open for twenty or thirty years a road for public use, in consequence of the allowance for road on the south end of said lot being such that it cannot be made fit for travel as a highway. In 1858, A. made his will devising the whole of said lot to his son B. Afterwards, in 1860, A. got a deed of that portion of the said road allowance that butted on said lot, from the Council of the township. A. subsequently died (in 1863), without revoking or altering his will, and owning said lot 7. A. left other children besides B., who dispute B.'s title to the said portion of road allowance, on the ground that no mention of the said portion was made in the will; that the deed for it was given by the Council subsequent to the making of the will, &c.

Is B. entitled to the said portion of road allowance, or are the other children entitled to equal shares of the same? If so, supposing A. had never taken out a deed, who would be entitled to obtain a deed from the Council? B., as owner of lot 7 under will?—or should the deed have been made to all A.'s children as heirs-at-law? Also, should the deed for said portion of road allowance express that it was given in lieu of road opened across lot 7?

Yours truly,

A Subscriber.

P. S.—In a deed, part of the description of a farm, consisting of parts of several different lots, that is to say, a line between two points, was omitted, so that the description does not really inclose the land. Does the deed containing the defective description give the purchaser a title to the land intended to be conveyed by the deed?

[We are not disposed to answer questions of this kind. Even if we were so disposed we would not undertake the task without having the entire will mentioned in the letter, and the entire deed mentioned in the "P. S." before us. Our correspondent had better hand both with a proper fee to some counsel, and get his opinion on the questions submitted. —Eds. L. J.]

A Welsh Jury.—At the Montgomery Quarter Sessions, held at Newton, last week, before Mr. C. W. Wynne, M. P., and a bench of Magistrates, a tailor, named John Welsh, was placed in the dock charged with stealing a milk can, the property of David Davies, residing at Melford. The prisoner was undefended, and the jury, after hearing the evidence, handed in a verdict of guilty, and Welsh was sentenced to three months' imprisonment, with hard labour. According to the local *Express* it has since transpired that, so far from finding the prisoner guilty, the jury were unanimous in the belief that he was innocent, and the foreman was charged with a delivery of a verdict accordingly, but that when he stood up to reply to the formal question of the clerk of the court the unfortunate man lost his presence of mind and delivered a verdict of "Guilty," and the prisoner was consigned to gaol in the presence of the jury, who were too freightened to interfere.—*Law Times.*

Intelligent Jurymen.—Sir. W. Erle in the course of his evidence on juries was asked whether it would be advisable to give juries desks and writing paper on which they might take notes. The learned gentleman made no direct reply to this inquiry, but said that 'the most intelligent and the best juries with whom he had been brought in contact, patiently listened in silence to all the evidence and all the speeches, and then found a verdict for the plaintiff or the defendant.' A talkative juror is fortunately rarely met with, but Sir. W. Erle evidently thought that the temptation to cross-examine would prove irresistible if once juries got into a habit of taking copious notes.—*Law Times.*

DIARY FOR SEPTEMBER.

2. Wed..Last day for notice of re-hearing.
6. SUN..13*th Sunday after Trinity.*
7. Mon..Recorder's Court sits.
8. Tues..Quarter Sessions and County Court sits in each County.
10. Thurs Re-hearing Term commences.
13. SUN..14*th Sunday after Trinity.*
20. SUN..15*th Sunday after Trinity.*
27. SUN..16*th Sunday after Trinity.*
29. Tues..*St. Michael.*
30. Wed..Appeals from Chancery Chambers.

THE

Canada Law Journal.

SEPTEMBER, 1868.

THE WHALEN TRIAL.

This most engrossing case is so familiar to every one in the Dominion that it would be but a waste of time to refer to it at length. There are, however, some important and suggestive features in it which demand attention.

It is in the first place a proud thing to feel that the reliance of our people in the strength and majesty of the law is such, that they are content to leave to the even course of that law the punishment of a dastardly crime against it; and not only a crime against the law as such, but a crime revolting to the better instincts of our nature, and, from attendant circumstances, rousing a bitter feeling of indignation and horror, a feeling which would naturally find vent in a desire for speedy punishment or perhaps vengeance on the perpetrator. But it was not thought necessary even to accelerate the sittings of the ordinary tribunals, much less to do what had a strong shew of necessity owing to the peculiarities of the case,—the appointment of a special commission for the trial of the offender. We have seen under somewhat similar circumstances in our near neighbourhood the bad policy and the evil effects, to use no harsher words, of allowing the passions of the hour, just and righteous enough within proper limits, to influence the due and orderly administration of the law.

It is of less importance (except for the effect produced in justifying the confidence of the public, and so sustaining the feeling we have alluded to) that the result has been to discover and legally fasten the crime upon the real criminal, for it can scarcely be questioned by any sane man, nor is it doubted by any person, that we have secured the perpetrator of the deed in the individual who has been found guilty and sentenced to suffer the extreme penalty of the law on the 10th day of December next. And in connection with this, we may remark, that one of the strongest features of the case against the prisoner, though one to which we have only seen a passing allusion, is, that no shadow of suspicion appears to have fallen upon any person other than the convicted prisoner. From first to last every circumstance has told against him, and against no one else, nor has there been any suggestion by the prisoner or any one else that any other person known or unknown might have committed the murder.

To those who consider that the guilt of the prisoner was proved on the trial beyond all reasonable doubt, it may seem a pity that there is still a possibility that he may yet go unpunished, for it cannot be denied that on a new trial there might and probably would be a difficulty in producing all the evidence that the Crown had at the last trial, and that it would give the unscrupulous friends of the prisoner an opportunity of manufacturing evidence difficult to rebut, or of buying up or making away with the witnesses on whose evidence the verdict lately given was founded. We do not at present desire to discuss the probabilities of a new trial, the only possible ground for which is of course the ruling, that a prisoner must exhaust his peremptory challenges before he challenges for cause,—though we cannot but regret that, apparently in this single matter, the counsel for the Crown failed in that tact which, with this exception, he evinced in the conduct of the case throughout. The exigencies of the prosecution did not require a strict enforcement of the rule of law contended for by the Crown, if such rule there be, for even an indulgence to the prisoner in this matter would not, in all human probability, have affected the result, and no doubtful question would then have arisen.

But supposing the objection to be sustained, and the claims of justice delayed or defeated, though we may regret that in this particular case the example required for such evildoers may not be made for the prevention of similar crimes, we must not forget that the objection is intimately connected with one of the safeguards provided by that same law that overtook the criminal, for the protection of those who might be falsely accused.

The very strength and majesty of the law implies a tenderness to the accused which few would wish to see destroyed. The finite understanding of humanity renders it necessary that the law for one man should be the law for another, and that there should be no distinction of persons.

To those concerned in the conduct of this remarkable trial, whether we speak of the conduct of the judge on the bench, the patience and attention of the jury, or the unvarying fairness, good temper, tact and zealous devotion of the counsel on both sides, great praise is due. With respect to the counsel for the Crown, his able management of the case, with the one exception already alluded to, was only equalled by his fairness to the accused. As to those on the other side, we need not here speak of the conduct of Mr. Farrell, of whom the less said the better, particularly as he is not a member of our bar, nor amenable to, and possibly ignorant of, rules which are supposed to guide professional men, at least in this part of the Dominion.

Nor is it necessary to discuss whether the senior counsel, who so ably and faithfully conducted the defence, was right or wrong in accepting a brief for the prisoner. Every lawyer knows that he would have been disgraced if he had refused to do so. For although his talents are supposed, from his position as Queen's Counsel, to be peculiarly at the service of the Crown, that, in itself, does not debar him from defending a prisoner; and it is not the practice in this country, as we believe it is in England, to obtain for a Queen's counsel a license for that purpose. His character as leader of the Bar of Ontario, and his knowledge of his responsibilities in that respect, preclude the thought that he would have hesitated for a moment in assuming even a much more odious position in the eyes of the public if his duty required him to fill it. It is only because some few persons, who, perhaps, ought to know better, appear to be ignorant of these matters, that it is worth while, even at this length, to refer to them.

There is much more difference of opinion as to the propriety of a member of the local Government accepting a retainer in a case of this kind, and under its peculiar circumstances—circumstances which may be said to have imparted to the crime a treasonable character, and made the trial somewhat of a state trial. The crime was, partly at least, aimed as a blow against the state by some one who would seem to have been in some way connected with, and perhaps the chosen agent of an organization avowedly desiring the overthrow of the power of our Sovereign. If the acceptance of office in a government is a tacit retainer in such a case as we have described, on the supposition that a distinction is to be drawn between such a case and an ordinary trial where the Queen is the nominal prosecutor, and if his duties as a sworn adviser of the Crown could, by any possibility, interfere with his duty to his client (and this really seems the principal difficulty), and if he could not take to the consideration of any point which might arise in the case, and come before him as a member of the Government, a mind perfectly free from bias, which few human beings could do, he might well have refused to act for the prisoner. If otherwise, the duty of the learned counsel, however anomalous his position might appear on the surface, was clear, and he acted properly in not refusing to defend a person (innocent by the law of England until proved guilty), who chose to call upon him to do his duty by him as a fearless advocate should. The question with Mr. Cameron, probably, was not—can I find an excuse for refusing this brief—but, is there any conclusive argument or absolute reason why I should not accept it, for if not, I am *bound* by my barrister's oath to do so. Different men take different views of what their duty would be under a particular state of facts, and the view which Mr. Cameron took, and acted upon, though some may think it an extreme one, must be respected as the conscientious opinion of an honorable advocate, acting on his own view of the principles involved.

Anything that would have been grateful to the feelings of our late revered Chief Justice, Sir John Beverley Robinson, if he were alive, cannot but be of interest to those who cherish his memory. The thought arises from hearing of the success achieved by his youngest son, a lieutenant in the Rifle Brigade, in obtaining the appointment of Instructor of Military History at Sandhurst. The position, in itself an honorable and lucrative one, was purely the reward of merit, and his success is the more marked, as the competition was open to officers of the army in general.

SELECTIONS.

LORD CRANWORTH.

Within two years of fourscore Lord Cranworth died suddenly on Sunday last, the 26th ult. The plain record of his birth, education, and subsequent career is this: Robert Monsey Rolfe, first Baron Cranworth, was the eldest and only surviving son of the Rev. Edmund Rolfe, of Cranworth, Norfolk, who was first cousin of Horatio, Viscount Nelson. He was born Dec. 18, 1790; educated at Winchester and Trinity College, Cambridge, 17th Wrangler in 1812, going out as M. A. He was called to the Bar at Lincoln's inn 1816; made a K. C. 1832; was Solicitor-General 1834 and 1835-39; a Baron of the Exchequer 1839-50; a Vice-Chancellor 1850-51; one of the Lords Justices 1851-52; and Lord High Chancellor 1852-58, and again 1856-66. He was M. P. for Penryn 1832-39; was also a governor of the charterhouse. He married, in 1845, Laura, youngest daughter of T. W. Carr, Esq., of Frognel, Middlesex, but leaves no issue.

"It was just one year after Waterloo," observes a contemporary critic, "that he was called to the Bar and took chambers in Lincoln's Inn; having made up his mind to 'eat' his way to the Woolsack. For many years it did not seem as if his ambitious dream were at all likely to be realised and he had shown himself for many seasons in Westminster Hall —appearing chiefly in the equity courts—before briefs came in to him in any remunerative number. But he was patient and laborious, steady and sound, and in due course of time, as his merits became known among the solicitors, things began to change for the better. He had good connections among the members of the Liberal party, and some of the business which more talented men declined came to his hands. In this he showed such patience and good sense, and such sound knowledge of the intricacies of the law, that the little brook of fees gradually became a stream, and the stream had increased to the dimensions of a tidy-sized river in 1832, when he was honoured with a silk gown. He was already Recorder of Bury St. Edmunds. Like many another ambitious brother of the wig and gown, he made in the mean time one or two unsuccessful efforts to get into Parliament, but he did not achieve his object until the general election in Dec. 1832, when he was returned in the Liberal interest for the Cornish borough of Penryn, for which he continued to sit, without interruption, until his promotion to the bench."

The same writer also faithfully relates the conspicuous features of Lord Cranworth's judicial life. "A seat on the judicial bench was held by him in one capacity or another, without a break, for nearly twenty years, first as a puisne Baron, then as a Vice-Chancellor, then as a Judge of the Court of Appeal in Chancery, and ultimately as Lord Chancellor; but through these twenty years there is scarcely any one very great and important matter of public interest with which his name as a judge was mixed up. He presided, indeed, at the Norfolk assizes in 1849, when Rush was tried for the murder of Mr. Jeremy, and kept his temper and presence of mind with exemplary firmness when browbeaten by the hardened villian who stood before him as the 'prisoner at the bar;' and in memory of this occasion he was often called by familiar friends, 'My Lord Killrush.' Firmness, steadiness, soberness, patience, dignity, wide knowledge of points of law, and of the relative value and weight of scattered pieces of evidence—these were legal and judicial virtues for which he deserved all praise; but to the masterly grasp of legal principles which marked Lord Eldon in the days of our fathers, and Lord Mansfield in those of our grandfathers, he could not, and did not, ever prefer a claim. Among legal circles his name will be associated most intimately, perhaps, in future years, with the removal of the sittings of the equity courts from Westminster to Lincoln's-inn. He held the great seal a second time, from the resignation of Lord Westbury until the recent return of the Tories to office. Sir Robert Monsey Rolfe, as Solicitor-General, and as a judge, it was often said, had a kind heart and an ever-smiling face. His looks did not belie the real nature of the man within. As an advocate in the courts, indeed, and as a member of the House, he showed no symptoms of fancy, or even of liveliness: and he seemed as if he could not for the life of him imagine what anything light or playful could have to do with either side of Westminster Hall. His speeches were even dull and somnolent; and often must both the judge and the audience have desiderated a little bit of vivacity or wit. But it never came. There was nothing but an even flow of dull and dry, but correct, legal matter, unrelieved by the shadow of a joke or jest, even when the subject invited it; and yet his ever-pleasing countenance was radiant with smiles. When, therefore, he sat upon the bench as a judge and became Lord Cranworth, he had no jocose habits to unlearn, no impaired dignity to regret. Somewhat under the average height, rather feebly made, and with a pale complexion, his slightly angular and prominent nose and light grey amiable eyes made his personal appearance prepossessing, and their owner a favourite with all who were bronght into contact with him."

We have not adopted the practice of giving contemporary opinions of great lawyers, considering that an opinion of a lawyer upon a lawyer, as a lawyer simply, is almost valueless. The opinions of contemporaries in the press and in the senate on the other hand may be well preserved. Lord Cairns thus speaks of the deceased ex-chancellor, before commencing a speech on the Bribery Bill:—"I must commence by responding very sincerely to the statement made by the noble earl with reference to the great loss your lordships have sus-

tained since the last meeting of this House, in the case of my late noble and learned friend Lord Cranworth. My lords, of the loss of Lord Cranworth as a friend to those who had the privilage of enjoying his friendship, I feel it impossible to speak; but this I may say, that your lordships and the public in him have lost one who has passed through a long career of high judicial office without a tarnish upon his name, and I will venture to say that in the discharge of his great duties his courtesy of manner, his careful and conscientious efficiency as a judge, and above all, his sound and exquisite common sense, have never been surpassed by any person who ever before held the same office."

The *Times* remarks that "Although Lord Cranworth lived in agitated times, he never made a personal enemy, and, although during the years in which he held the Great Seal he presided over debates of the keenest interest, the demeanour of the House of Lord was under him maintained unruffled. His career was of a kind of which Englishmen are not unnaturally proud. He was the son of a country parson, and he made his way in the world by his own good abilities and sterling character. A sedulous schoolboy, a successful if not a distinguished student at the University, an advocate of trusted reputation, a Judge of the first rank both on the common law and equity sides of Westminster Hall, distinguished as a lawyer by his freedom from the prejudices of his profession, and as a politician by his perfect temper and consistency, Lord Cranworth earned the position he held, with the approval of all men. It was as impossible for him to sympathise with the stormy violence of Brougham as with the dogged resistance Eldon offered to change. His life had been too easy to allow him to be revolutionary, and owing nothing himself to privilege, he was never tempted to engage in a vain battle in defence of privileges. He had worked hard for many years, but his labour had been well rewarded; and as he kept his mind open to fresh impressions to the last, he never sank into the optimism of those who think the world must be perfectly well ordered because they are themselves tolerable comfortable in it. Few men enjoyed greater personal popularity. He was a thorough Whig, but he never allowed the keenness of his partisanship to cloud his judgment or to warp his actions. Fair and equal to all, no man grudged him his elevation, but rather everyone rejoiced at a conspicuous instance in which abilities carefully cultivated had obtained distinguished reward."—*Law Times*

THE NEW JUDGES.

The names of the gentlemen selected by the Lord Chancellor to fill the additional judgeships, established under the Election Petitions and Corrupt Practices Act, have been published. Mr. Serjeant George Hayes is to be the new judge of the Court of Queen's Bench; Sir W. B. Brett, Q.C. the new judge of the Common Pleas; and Mr. Anthony Cleasby, Q.C., the new baron of the Exchequer. Mr. Hayes was called to the bar in January, 1830, and has practised on the Midland Circuit. He was called to the degree of Serjeant-at-Law in 1856, and received, in 1860, a patent of precedence, ranking next to Mr. A. J. Stephens. He has also for some years held the appointment of Recorder of Leicester. Sir William Baliol Brett was called to the Bar in 1846, made Queen's Counsel in 1861, and appointed Solicitor-General in February of that year, upon the elevation of Sir C. J. Selwyn to the Bench. Mr. Anthony Cleasby was called to the bar in June 1831, and made Queen's Counsel in 1861. Both Sir W. B. Brett and Mr. Cleasby practised on the Northern Circuit.

It is very difficult to offer any just criticism on these appointments. There are, no doubt, some gentlemen whose claims to promotion seemed strong and the expectation of the profession has not in every respect been realised. The Solicitor-General had, both by virtue of his office and his genuine merits, an irrefragable claim. He will not only strengthen the commercial ability of the Court of Common Pleas, but he will render great service in expediting business, when necessary, in the Court of Admiralty, and also in the Divorce Court. It is open to the Bar to deny him genius of a high order, but his knowledge of mercantile law, and his great experience in all kinds of shipping and commercial transactions, are beyond question. Mr. Serjeant Hayes has won his chief renown at Nisi Prius, and enjoys a world-wide fame for humour, keenness of wit, and perception of the motives and tendencies of human action. It may therefore be fairly expected that he will exercise his judicial functions at Nisi Prius with perfect success. Mr. Cleasby is a gentleman of high literary attainments, and is possessed of a trained and accomplished mind. His utility will be displayed in Banco rather than at Nisi Prius. University men will note with satisfaction that Sir W. B. Brett and Mr. Cleasby are *alumni* of Cambridge, at which seat of learning the latter gentleman distinguished himself by acheiving the position both of a wrangler and a first-class classic. It will be remembered that Mr. Cleasby contested the representation of the university of Cambridge in February last, but was defeated by Mr. Beresford Hope.—*Solicitors' Journal.*

A RUN OF LEGAL PATRONAGE.

Although the remarkable good fortune of Conservative lawyers during the past two years has been frequently made a subject for comment, at no time has either a complete list of the appointments or an estimate of the value of the patronage been given. Now that three new judges have been added to the already long list, there may be some interest in knowing how the composition of the judicial

bench has been changed since the present Government came into power. Including two new Lord Chancellors in England and two in Ireland, 27 equity and common law judges have been created. The following are the appointments, distinguishing the three kingdoms:—

England.

Bovill, Rt. Hon. Sir W....	Chief Justice of Common Pleas.
Brett, Sir W. B.	Puisne Judge of Common Pleas.
Cairns, Lord.....	Lord Justice of Appeal; now Lord Chancellor.
Chelmsford, Lord	Lord Chancellor.
Cleasby, Mr.....	Baron of the Exchequer.
Giffard, Sir G. M.....	Vice-Chancellor.
Hannen, Sir J.....	Puisne Judge in Queen's Bench.
Hayes, Sergeant	Puisne Judge in Queen's Bench.
Kelly, Rt. Hon. Sir F.	Chief Baron of the Exchequer.
Malins, Sir R.	Vice-Chancellor.
Phillimore, Rt. Hon. Sir R.	Judge of the Admiralty Court.
Rolt, Rt. Hon. Sir J.....	Lord Justice of Appeal.
Selwyn, Rt. Hon. Sir C....	Lord Justice of Appeal.
Wood, Rt. Hon. Sir W. P..	Lord Justice of Appeal.

Ireland.

Blackburne, Rt. Hon. F...	Lord Chancellor.
Brewster, Rt. Hon. A.	Lord Justice of Appeal; now Lord Chancellor.
Chatterton, Rt. Hon. H. E.	Vice-Chancellor.
Christian, Rt. Hon. J.	Lord Justice of Appeal.
George, Rt. Hon. J.....	Puisne Judge in Queen's Bench.
Lynch, Mr.	Judge of Landed Estates Court.
Miller, Mr. S. B.....	Judge of Bankruptcy Court.
Morris, Right Hon. M.	Puisne Judge of Common Pleas.
Napier, Rt. Hon. Sir J....	Lord Justice of Appeal.
Walsh, Right Hon. J.....	Master of the Rolls.
Whiteside, Rt. Hon. J.....	Chief Justice of the Queen's Bench.

Scotland.

Inglis, Rt. Hon. J.....	Lord Justice General.
Patton, Rt. Hon. G.	Lord Justice Clerk.

It will be seen that the office in which the changes have been most numerous is that of Lord Justice of Appeal. In England Lord Cairns left it for the woolsack, and Sir John Rolt, after holding the appointment only six months, was compelled to resign through ill-health. The nomination of Sir Joseph Napier to the Court of Appeal in Ireland was objected to so strongly on account of his suffering from deafness that he sent in his resignation before he had entered on the duties of his post. His successor, Mr Brewster, held the office eight months, when he was promoted to the Chancellorship. It may be added that thirteen of the new judges were returned as members of the present Parliament, and that the offices of Attorney and Solicitor-General in England and Ireland, and of Lord Advocate and Solicitor-General in Scotland, have been filled and refilled nineteen times. The vacant Solicitor-Generalship in England will now render a twentieth nomination necessary.

The value of the judical offices which have been filled during the past two years varies from £2,000 to £10,000 each, and represents a sum of £145,000 a-year.—*Daily News.*

LAWYERS' WIGS.

The heat has raised the question of wigs, and with it a discussion, never yet settled in England, as to the merits or demerits of official costumes. The subject looks a small one, but it is worth arguing, for it involves in a very direct, though it may be a rather ridiculous way, a matter of some importance, namely, the end which the social reformers of the day intend to seek. Are they, to put it colloquially, going in for reality in all things, or only for equality in all things? The two ends are very different, and we do not know that the difference can be better illustrated than by this very dispute about clothes. The able judge who presides in the Divorce Court, Sir James Wilde—who, be it remarked, *en passant*, has filled Sir Cresswell Cresswell's seat in a manner which was said to be impossible, showing himself at once a consummate judge, a man of the world, and a man of principle—this week advised the Bar to lay aside their wigs during the extreme heat. They complied very gladly, and the momentary breach of etiquette was taken advantage of to decry the somewhat antiquated and inconvenient costume still worn by the members of the Bar. In India and America, it was argued, the whole absurdity has been abolished. Judges are there considered citizens, invested with certain functions for the benefit of the community, and wear, without detriment to their office, the ordinary dress of gentlemen; barristers plead in frock-coats, and wigs are only worn at masquerades. Why should not the lawyers do the same in England?—why, in fact, should not everybody dress in the same costume, and the special office be left to enforce and receive such respect as is inherent in its powers, or its merits, or even its antiquity, and not in its clothes? There is no doubt that with the advocates of equality, and indeed, more or less, with most men of democratic opinions, this matter of robes is a sort of crucial test; that they heartily dislike them as relics of feudalism or other deceased organisation of society, and will, if they can, abolish them altogether. An active and, so to speak, powerful impression of that kind deserves study, if only that we may know on what basis of reason our prejudices rest; and this particular impression, as we have said, involves much.

Primâ facie, the weight of reasoning would seem to be all against the clothes, if only because the ordinary arguments in their favour are so singularly inapt. The defence from the analogy of uniform, for instance, is an absurd one, for uniform is worn by soldiers and sailors as their weapons are worn, to increase their direct efficiency. A body of soldiers or sailors in uniform is more easily recognisable by its officers and its own members than a body without such uniform, and that power of easy recognition is a valuable and indeed an essential element of force. It is usual to say that a uniform gives a soldier pride, and helps to

preserve a sense of honour and that tradition of merit which has all the beneficial effect of pedigree; but the original motive of uniform was the more vulgar one, increased efficiency, increased power of distinguishing between friend and foe. The proof of the fact is that in a night attack, when ordinary uniform would be indistinguishable, able commanders always try to devise a new one, a white sleeve, or a cross, or other mark which can be recognised when there is very little light. Uniform has other uses, the greatest, perhaps, being that it marks the soldier from the civilian, and therefore, by making the armed man specially visible, makes him also specially responsible; but its main use is the increase it affords of direct power to the soldier to do the work for which he is educated, privileged, and paid. No such advantage can be claimed for most ceremonial uniforms, for those worn by deputy lieutenants, courtiers, diplomatists, or even, with all respect be it spoken, barristers and judges. They could do their work as efficiently in ordinary costume as in special dress, and the popular defence of their robes needs examination before it is accepted. It is said, again, that the robes and the wigs increase the respect with which judges and the counsellors are regarded by the multitude, and as it is well that the multitude should respect the ministers of the law, it is well that the latter should wear dresses which inspire respect. The argument deserves more attention than the analogy from uniform, because, to begin with, its two main propositions are undeniably true. Nothing, no one sentiment man has ever evinced, is quite so valuable as respect for law. That is, we hope and believe, the feeling, or, to say what we really mean, the faith which as civilisation advances will be the sufficient substitute for "reverence" in its social sense, "loyalty," "obedience," and many other sentiments which, once real and beneficial, are now becoming unreal and therefore mischievous. It is also true that the masses of half-civilised men do respect authority in fine clothes, or rather in exceptional clothes, more than authority in ordinary dress; do feel more inclined to obey a "Red Judge," than a judge in a frock-coat; do hesitate more to criticise a decision given by a man in a wig than one delivered by a man without one. But this is not quite the whole case. If this reverence for clothes, inborn as it seems to be in some Western races, is founded in any noble feeling, *cadit quæstio*, let us cultivate custom, but if it is founded in a base proclivity of the human mind, then not even the value of reverence for law, not even the aid the false respect lends to the administration of justice, is a sufficient excuse for pandering to such a depravation of instinct. The American Democrat is then right, who holds all such things degrading; and not the Continential Democrat, who holds them degrading or ennobling according to their social intent, who, for example, like most Reds, would have all men dressed alike, *unless* honoured with a function from the people. The point is not what it is supposed to be, the effect of clothes in securing the obedience of the multitude—which we admit to the full, and might, possibly, exaggerate—but the effect of exceptional clothes worn by officers of the state or of the law in elevating to the multitude. If that is not secured, the case of the clothes will ultimately be lost, for the sentiment of equality, as far as it goes—and it goes a wonderfully little way—does ennoble men, and is not lightly to be disregarded. There is this much to be said even for the election of judges, in itself the most fatal custom democrocy has instituted, that it does force the ordinary man to consider what the law he helps to make really is, and why its exponent, whom he has helped to appoint, is deserving of his sedulous respect, a consideration much more to his mental and moral advantage than blind fear of the judge's power.

We confess we do see grave reason to believe, though we shall irritate many sober thinkers by saying so, that the system of official clothing will stand this supreme test; that the special robe worn by the judge, or the barrister, or the policeman does actually elevate and not simply blind those it is intended to affect, does appeal to a certain nobleness and not to a certain baseness in their inner nature. We doubt whether the feeling which we English are compelled to describe by a Latin word, solemnity, be not a sound instead of an unhealthy state of mind, whether it does not often mean, whether in church or court, or ceremonial, supposing it always to be real and not factitious, that the better nature of the man is struggling to the front, that his brain and heart are quickened and raised under it, instead of being debased or deteriorated. Any severe call on a man, even if it be only a call to self-defence, makes him, or should make him, more of a man, would make him, if he were in the mental condition we all desire to see him reach; and there is no call quicker or more certain of a response than that made by any real solemnity. If that is true—and we all acknowledge it in connection with worship, though half of us seek the exciting means in a simplicity which, so to speak, reveals God, and the other half in a magnificence which honours Him—the case for the clothes is won, for nothing produces solemnity like a sudden change in the ordinary circumstantials and surroundings of life. We could produce it, for example, most effectually in a court of justice without any change of clothes, by merely altering the colour of the atmosphere. We do not doubt that if every criminal were tried under red light, or blue light, or green light, or any light to which mankind are unaccustomed, the effect on him, on the bar, on witnesses would be one of awe; that there would be greater reluctance to tell lies, greater fear of resistance to law, greater disposition to realise the divinity, so to speak, of the whole machinery, than if there were no such diver-

gences from the appearances of everyday life. That contrivance, though once familiar to many quasi-religious tribunals, is at once too inconvenient and too theatrical for our own time or for habitual use; but its effect, though differing in degree, would be identical in kind with that of the exceptional clothes worn in English courts of law—would, that is, bring home to all present the fact that they were in an atmosphere different from that of everyday life, an atmosphere in which truth was more indispensable, fairness more certain, justice more swift, than in the street or the home.. Why should the strong though temporary concentration of mind produced by such an atmosphere debase instead of ennobling? As a matter of fact, we know that it does not, that, for example, although there is much lying in English courts of justice—frightfully much, especially when the object is to make of moral legal evidence—still, witnesses are more truthful, more conscious that they ought to be truthful in a court than in the street. It may be said, that is all the fear of punishment; but we would ask any honourable man who means to speak truth always, whether he did not become in court more exact, more literal, in fact, though not in intention, more truthful than when he was out of it. He would be so in any court, whether the judge were robed or not? Doubtless, because the aspect of every court, the mere fact that the assembly is a court, makes him so; but the effect will be all the more rapid and complete for any violent divergence from the associations of everyday life, and the easiest of such divergencies is a change of costume.

It may be said that this argument would justify any amount of official bedizenment, any absurdity in special costume; but that is a mere assertion, to be tested by the effect of the clothes. In some cases the effect of divergence is distinctly bad, as, for example, when it produces any kind of reverence for the clothes themselves, as must happen whenever they increase the prominence and visibleness of an unreal or bad idea. That would be the case, for example, if mere differences of rank were marked in the modern world by sumptuary laws. Or the clothes themselves may be objectionable, not because they are meaningless so much as because they awake some false or grotesque association. That is the case with English Court dress because it is so like a footman's, with the Windsor uniform for almost the same reason, and with one form of episcopal dress because it is so nearly that of another sex. The ordinary English clergyman's robe of office wakes no such feeling, but on the contrary warns the audience that the speaker is about to address them on subjects higher than those of a public meeting, helps to put them in a frame of mind more instead of less receptive of the ideas he has to communicate. We might as well argue that gesture is no part of oratory, melody no part of poetry, form no part of substance, as that dress can lend nothing to solemnity of ceremonial except an emotion which is either a surplusage or a baseness. It is neither, if our view is correct, but an aid, tending to concentrate, and therefore, to strengthen, the impulses and faculties we all desire to call out.—*Law Times.*

NATURALISATION.

The Congress of the United States has passed a Bill nominally for the protection of its own naturalised subjects, but, in fact, dictating to other countries how they shall deal with their own citizens.

The alleigance of every man is due to the country of his birth. Of that allegiance he cannot divest himself, save in the manner prescribed by the laws of *his own* country. Manifestly no other country has a right to determine on what conditions the subjects of another State shall be released from their allegiance.

For instance, the Legislature of the Dominion would have no right to make a law declaring that a citizen of the United States by crossing the frontier into Canada shall be discharged from his allegiance to the United States. But they could, and it is all they could, enact that a stranger should become naturalised in Canada by residing there for a week or a day, that a residence under such a law should make the visitor a Canadian subject, but it would not unmake him a subject of the United States.

This is, however, the form which the new law has taken in America. It does not say in so many words that a British subject shall cease to be such by complying with the conditions of naturalisation in the States, for even more than Yankee audacity would be required for such a clause. But it does the same thing in effect, for it says that, the law of his own country notwithstanding, any foreigner, becoming naturalised according to the law of America, is to enjoy all the priveleges of Americans by birth, and one of these privileges is that in his own native country that man is not to be amenable to the law from whose obligations he has not been discharged.

We may endeavour to disguise what it is inconvenient to acknowledge, but the truth is that this law is levelled at England, and is designed to assist the Fenian conspiracy. It recognises as American subjects many thousands of traitors whom the British law still recognises as British subjects, and it can scarcely fail to cause some dangerous complications. There can be no desire on the part of this country to keep the allegiance of the Fenians; England would willingly make a present of them to America, and would consent to the shortest possible residence in the States as the condition of being quit of them. But then many other consequences follow. If they choose to leave us, we must alter the terms on which they are to be allowed to return. With their allegiance, they must forfeit all right of succession to property, or to hold property—in short they must cease to be British subjects

for all purposes. Moreover, we shall be compelled for our own security to place them under a very strict surveillance when they choose to pay a visit to Ireland, and the practice of the mixed jury must be abolished. Even America cannot dispute our right to prescribe our own terms for the admission of foreigners into our territories, and perhaps it will be found that those terms may make speedy naturalisation in the States by British subjects, not quite so desirable as it may have appeared. Mr. Reverdy Johnson should take for the first essay in his new office of minister in London an honourable settlement of this difficult question, before quarrels have grown out of the hasty Act of Congress.—*Law Times.*

PROFESSIONAL COURTESIES.

We of the present generation are apt to be rather impatient with our seniors when they tell us of the great worthies of their day, and how incomparably superior they were to the ablest men we can produce. By their report there were giants in those days, and we live amongst pigmies. While there can be little doubt that in memory, as in nature, "distance lends enchantment to the view," and softens many hard and unpleasant lines in character, yet making every allowance for this influence we cannot help feeling that in some respects there may be good cause for this contrast which is so much to the disadvantage of the age in which we live. Not to speak of weightier matters or qualities of more moment, we think it must be admitted by even the most ardent and enthusiastic admirer of this age of progress, that in one virtue of our ancestors, namely, courtesy, there is a most observable decline amongst us.

We are far from thinking or desiring to assert that there are few gentlemen in the present day, but we are forced to the conclusion that courtesy is a quality held at an exceedingly low estimate just now. If we desire to see true gallantry and politeness we turn not to the youth, but to the elders of our day. It is amongst them we find that thoughtful courtesy, and regard for the feelings of others, which is so characteristic of the true gentleman. In the present day men do not seem to have either the time or inclination to cultivate the *suaviter in modo.* It is not, in the estimation of the majority, a sufficiently productive or profitable quality to be worth cultivation. Perhaps the importation of Transatlantic "notions" into this country may, in some measure, account for the degeneracy of manners in the present day, and for the freedom, amounting to positive vulgarity, which is sometimes to be met with where we should least expect it. Whatever may be the cause, we regret to say, the fact is too patent to be denied that in the present day the courtesy which used to govern many relations of society is manifestly declining. We are old enough to remember when journalists treated each other with respect and politeness, even when they were most opposed in politics. Now no such courtesy seems to be used or expected, and editors abuse each other in the strongest terms of vituperation, and exhaust the vocabulary of invective in their efforts to prejudice a contemporary in the eyes of the public.

But this want of courtesy has latterly become apparent in a sphere in which we are more particularly interested. Without the extent of memory possessed by an octogenarian, we can remember when politeness and dignity were the usual attributes of an advocate, and when counsel at the bar uniformly observed towards each other that respect to which their honorable profession so justly entitled them. The weapons of argument were not then less keen, nor the shafts of wit less brilliant than now, but they were never directed personally against professional brethren. There was a time when an early meeting in the Fifteen Acres would have been the result of such encounters between counsel as take place now without remark or surprise from the judge, the jury, or the public. Happily such modes of settling disputes have become obsolete, but surely it is possible to conduct trials at law without having recourse to weapons so unworthy of a learned and noble profession as personal scurrilities. How can we expect the public to respect a profession, the eminent members of which give such an exceedingly bad account of one another. One learned counsel deliberately charges the highest member of the Bar, and whose honour is as clear as crystal, with conducting his case like a "thimble rigger," while another charges his opponent, in open court, with the offence known in professional circles as "hugging attorneys," and in being afraid in the discharge of his duty, to cross-examine a solicitor too severely, lest it might cause him to lose a brief on some future occasion.

We regret exceedingly having to comment upon this subject, but we feel that the interests and dignity of the Bar demand that it should be noticed. If behaviour of this kind is to be the rule in our highest courts of procedure, what are we to expect from advocates before inferior tribunals? Yet we believe that in some courts of petty jurisdiction such personalities between the practitioners of the court would not be tolerated. We do not desire that members of the Irish Bar should emulate the cold and uninterested manner which often characterises eminent Nisi Prius lawyers in England; but we think that in the matter of propriety and decorum the former might sometimes, with advantage, imitate the latter. With us such an advocate is oftentimes, in fact, a great performer entertaining an amused audience, rather than a learned advocate enforcing his case before a jury. It is to this *ad captandum* kind of advocacy we trace those personalities between gentlemen of the Bar, which are our present cause of complaint, The argument does not need them, the jury

do not need them, and in fact they are merely indulged in for popularity, and "to split the ears of groundlings."

It is said that an experienced advocate once advised a professional brother, whenever he had a bad case for a defendant, to abuse the plaintiff's attorney. This suggestion seems now to be extended a degree further, and the next best thing to such a course appears to be to abuse the opposite counsel. We trust this practice may soon fall into disuse, as, in our judgment, it is one "more honoured in the breach than the observance."—*Irish Law Times*

The case of *Perry* v. *Taylor* has attracted general attention, both from the public and the legal profession. The defendant, the Rev. Dr. Taylor, is a minister of the Canada Presbyterian Church, who had married the son of the plaintiff, a lad of 16, to a widow, aged 49 The parties presented themselves before Dr. Taylor with a license, and the boy being asked his age by the clergyman, declared himself to be 22 years of age. This marriage was annulled by the Superior Court in a previous suit brought by the plaintiff for that purpose, the ground of nullity being the want of consent on the part of the parents of the minor. The action, *Perry* v. *Taylor*, was instituted for the recovery of damages for the illegal marriage. Mr. Justice Monk, on the 9th of July, after reviewing the facts appearing in evidence, expressed the opinion that the reverend gentleman should have done more than merely ask the age of the minor, the disparity of age and other circumstances being such as to awaken suspicion. He considered that a want of proper care had been manifested by the defendant, and on this ground he condemned the defendant to pay $100 damages, and the costs of the action as brought.

This decision seems to have been pretty generally approved by the public, as far as we have observed. It is certainly desirable that clergymen should not be in any uncertainty as to their responsibility in respect to the parties whom they marry.—*L. C. Law Journal.*

ONTARIO REPORTS.

PRACTICE COURT.

(Reported by Henry O'Brien, Esq., *Barrister-at-law, Reporter to the Court.)*

Leslie v. Foley.

Insufficient affidavit—Toronto agent of attorney.

In an application of strict right the court will not conjecture circumstances in favor of the applicant, who should support his case by the best and fullest evidence, and not, as in this case, with defective materials.

In such an application it will not be assumed by the court that the affidavit made by "the agent" of a person is the professional Toronto agent of such person, and that such person is a practising attorney.

[P. C. Easter Term, 1868.]

J. A. Boyd obtained a rule calling on the plaintiff to shew cause why a rule absolute, granted herein in the previous Term should not be set aside with costs for irregularity, on the ground, that the rule absolute was granted in pursuance of a rule *nisi* to pay over the amount of an award, which rule *nisi* should have been and was not personally served, and the materials on which the rule absolute was made were insufficient, and because the same was moved absolute prematurely, and before it was returnable.

The application was founded on an affidavit of Mr. Boyd, shewing that a rule *nisi* was obtained in this cause last Hilary Term calling upon the defendant, upon notice of the rule to be given to him, his attorney or agent, to shew cause why he should not pay to the plaintiff an amount awarded against the defendant and the costs taxed: that the rule issued on the 11th February, and was served on that day on the agents of the defendant's attorney, and that it was made absolute on Friday, the 14th, and issued on the 29th February, and that no further proceedings appeared to be had on it up to the time of this application. It was contended on the part of the defendant, that notwithstanding the object of the rule was to obtain an execution against defendant's goods under the statute, that the service should have been made personally, as in the case of seeking an attachment, and that the rule *nisi* could not have been moved absolute until after the 14th February.

C. S. Patterson showed cause, and, amongst other things, objected that the materials upon which this motion was made were insufficient, and that the only affidavit filed, and upon which the application rested, not shewing that the person who assumed to act as the professional agent of the attorney of the defendant, who was also a practising attorney, was such an agent.

J. A. Boyd supported his rule.

Morrison, J.—It is unnecessary for me to give judgment on the principal points raised, as I am of opinion that I ought to give effect to the objection that the materials before the court are insufficient to entitle the defendant to make this rule absolute. This application is one of strict technical right, and the defendant must make out a clear case The only affidavit filed is Mr. Boyd's, which states that Messrs. Read and himself are agents in Toronto of the defendant, but in what respect or for what purpose does not appear. I cannot necessarily assume that the defendant is an attorney or barrister, for nothing in the affidavit or papers filed shew that he is, and if I ought to do so, as suggested by Mr. Boyd, in that case I would be more stringent in exacting, on account of his professional knowledge, the strictest regularity in his proceedings Now all that appears here is, that Mr. Boyd a few days before the 22nd of May last, searched with the clerk of this court as to proceedings in this cause: that he was informed that a rule *nisi* (the one in question), issued on the 11th February, and was made absolute on the February 14: that an affidavit of service of a copy of the rule *nisi* was attached to it, shewing that it was served on the 11th on the agents of the defendant's attorney, and that the rule absolute was taken out on the 29th February: and Mr. Boyd states

that he verily believes that no cause was shewn against said rule, and that no copy of it to his knowledge was served on the defendant; and he states that he cannot obtain a copy of the rule absolute, as it is not filed.

All this no doubt is perfectly true, but notwithstanding, the defendant, or his attorney or counsel, may have appeared and shewn cause, or consented to the rule going. The rule *nisi* itself on its face is regular, for assuming that the general practice requires personal service (which I do not decide) the court may dispense with it, and order the rule *nisi* to go calling on the defendant upon notice to be given to his attorney or agent to shew cause.

The rule was served on the defendant's attorney, no affidavit is filed by that gentleman shewing whether or not he took any step in the matter; neither does the defendant himself make any affidavit denying that the rule came to his knowledge, or that he has or had any grounds or merits for opposing the rule, nor is it suggested that the proceedings injuriously affect his rights; and no excuse is given why the defendant or his attorney have not filed any affidavit, there being abundance of time between the 11th February and the 22nd May to do so; and as neither of them think it worth their while to make an affidavit stating the facts, and setting at rest any doubts as to what they did in the matter, or shew that they have any substantial ground of complaint, I do not think I am to conjecture circumstances to entitle the defendant to succeed. By doing so I should be sanctioning a loose and careless practice.

A party seeking relief, as sought in this case, ought to support his application with the best and fullest materials at his command, and not, as here, only file the affidavit of a gentleman, who merely states what appears on the files of the court, matters quite consistent with the regularity of the proceedings complained of.

Rule discharged.

IN RE SOULES v. MORTON.

Arbitration—Right of parties to go into case afresh before an umpire.

Where a case is referred to the award of two persons, and, in case of disagreement, to the decision of a third person, either as an umpire or as a third arbitrator, the parties have the right to insist that such third arbitrator or umpire shall have before him the evidence and witnesses produced before the two arbitrators, as well as the right to appear and state their case to such third arbitrator or umpire, before a binding award can be made.

[P. C., Easter Term, 1868.]

D. McMichael obtained, on behalf of Soules, a rule *nisi*, to set aside the award herein, on several grounds, one of which was that one of the arbitrators was not appointed until after evidence taken, and gave his award without having heard the parties or the evidence; also, that the arbitrator heard evidence on behalf of Morton, in the absence of Soules or any one on his behalf.

The submission was by deed dated the 17th April, 1868, and after reciting that disputes, &c., were pending between the parties, in reference to the annual sum of money to be paid to Mrs. Morton in lieu of dower, &c., and in order to settle the amount, &c., the parties agreed to refer the same to the award of two named arbitrators, and in the event of these two not being able to agree within two days from the date of the deed, then they could appoint a fit and proper person as third arbitrator by a memorandum to be endorsed on the deed, and the award of any two of them should be final and conclusive. The award was to be made in writing, on or before the 23rd April, with power to the arbitrators to extend the time, &c. On the 17th April the two arbitrators appointed the third arbitrator, and on the 23rd April the three arbitrators made the award now moved against, awarding an annual payment of $82 50, &c.

It appeared from Soules' affidavit that the two arbitrators proceeded with the arbitration on the 17th April: that both parties attended before them with their evidence, and were heard by the arbitrators, and although they had appointed the third arbitrator he was not present, nor did he hear the parties. The two arbitrators being unable to agree, they called in the third arbitrator, and the three arbitrators considered the matter among themselves and made their award, and did so without notifying Soules, and without his being heard by the third arbitrator, and he swore that if he had been allowed to place his case before the third arbitrator he would have convinced him that the annual amount was unusually large. Smith, one of the arbitrators, also made an affidavit stating that they named the third arbitrator to meet the event of the two not agreeing: that having considered the subject with his co-arbitrator they were unable to agree, and they then called in the third: that Soules and his evidence was not heard, nor was he offered an opportunity to be heard by the third arbitrator: that the son of Soules asked if they did not require his father, but he was told they did not, and Smith also swore that he was not aware that it was necessary or proper for the third arbitrator to hear Soules.

On the part of Mrs. Morton several affidavits were filed, going principally to show that the award was a reasonable one.

Harrison, Q C., shewed cause.

McMichael supported his rule.

MORRISON, J.—There is no dispute about the fact that the two named arbitrators first heard the parties; that being unable to agree upon the amount to be annually paid to Mrs. Morton they called in the third arbitrator, to whom, we may assume, they related the case made by the respective parties, and without the third arbitrator hearing the case except as stated; they conferred among themselves, and they then came to the conclusion of awarding as they did. It is to be regretted that the parties were not heard by the three arbitrators, as from the affidavits filed it is, I think, clear that the award is a fair and proper one, and if it were possible to uphold it I would do so, for it is just one of those cases in which the arbitrators, neighbours residing in the immediate vicinity of the land in question, could determine upon the statement of the parties alone, what was fair and reasonable, but on principle the award cannot be upheld. The third arbitrator was either intended to be an umpire or a third arbitrator. In either case the parties had a right, personally or by counsel, to

place their case before him, as well as the other two arbitrators. The award is a joint judicial act. The judgment of the three arbitrators was not the result of hearing the parties, for that of the third arbitrator was based on what the other two told him, in the absence of the applicant, and without his being notified that the third arbitrator was called in to deliberate on the subject. It is impossible to say what the parties would have done, or what course they might adopt to bring their case before the third arbitrator. If the case had been reheard they might have suggested a new view of the case, as said by Littledale, J., in *Salkeld* v. *Slater*, 12 A. & E. 767.

The general rule is, that an umpire to whom a case is referred by arbitrators must hear the evidence over again, and in the case cited Lord Denman says—"It is important to have it understood that the umpire, as well as the arbitrators, ought to hear and see the witnesses." And so in this case, the third arbitrator should have seen and heard the statement of the case from the parties themselves, or any witnesses they might produce. The parties are entitled to have their case, as made by themselves, put directly to the arbitrators, and are entitled to the benefit of the judgment of all three on the case, as made. Two of the arbitrators heard the case, apart from the third arbitrator, and the third heard it at second-hand and apart and in the absence of the parties, (as said by Coleridge, J., in *Plews* v. *Middleton*, 6 Q. B. 845)—"whereas it ought to have been considered by the arbitrators and umpire jointly, in presence of the parties." There is no imputation on the motives or conduct of the arbitrators; it is only the irregularity of the proceedings that invalidates the award; and the Court, in such a case, sends back an award to the same arbitrators, where there is no reason to believe that they are not to be trusted. I think that this is a case in which I ought to exercise that power, and that it should go back with an intimation that the third arbitrator should have an opportunity of hearing the parties and considering the evidence with the other two arbitrators.

COMMON LAW CHAMBERS.

In re O'Donohoe v. Warmoll.

Delivery and taxation of attorney's bill—Business done by attorney, as an attorney, though not in any suit.

An attorney or solicitor may be ordered to deliver a bill of his charges for business done by him *as such*, though the services performed were not, in whole or in part, for business done in court, as in this case, where the retainer was to investigate the title of and purchase property.

[Chambers, Sept 17, 1868.]

A summons was obtained calling upon the above attorneys to show cause why they should not deliver a bill of costs to one William Charles Pulaski, for professional services rendered in reference to the investigation of title to and purchase of certain property, situate, &c., wherein they acted as attorneys for the said Pulaski, shewing the moneys by them received from and paid out for the said Pulaski, with dates and items, &c.

The affidavit of the applicant stated that these attorneys were employed by him as such attorneys, in reference to the purchase of a certain lot of land; that as such attorneys they had transacted business and paid out money for him; and that, though frequently asked for, the applicant had not obtained any account of the services done, and money paid, &c.

Givins showed cause, and contended that, as the services performed were not wholly or in part for business done in court, there could be no reference of the charges to taxation. He referred to *In re Lemon and Peterson*, 8 U. C. L. J. 185.

Bigelow, contra cited, *In re Eccles et al.*, 6 U. C. L. J. 59; *Smith* v. *Dimes*, 4 Ex. 32, 40; 1 Ch. Arch. 11 ed. 109; C. S. U. C. cap. 35, sec. 35, and cap. 91, sec. 5.

Draper, C. J.—The Imperial Stat. 6 & 7 Vic., cap. 78, as affecting this application, differs from our Act principally in this—that when no part of the business has been transacted in any court of law and equity, the Lord Chancellor or the Master of the Rolls, may refer the bill to be taxed, or may order the delivery of such bill under the English Act, while the same powers are in language substantially identical, given to any of the Superior Courts of law or equity or to any judge thereof.

In the present case two questions arise:

1st—Is this a case in which business has been done by any attorney or solicitor as such, that is business of a professional character, which the respondents in this case were employed to do by reason of their character as attorneys or solicitors. The business is stated to be proof of personal services rendered in reference to the investigation of title to and purchase of certain property. Now an action would lie against an attorney for negligence in such investigation or for investing his client's money on insufficient security, and that shews the acts are professional services proper to be rendered in the character of attorney or solicitor, on a retainer as such. I think therefore the client is entitled to a bill.

2nd—In our statute, power is given to every judge of the Superior Courts of law and equity, to order the delivery of a bill for business done by any attorney or solicitor as such.

I think the order should go.

CHANCERY CHAMBERS.

(Reported by J. W. Fletcher, Esq., Barrister-at-Law).

Griffin v. McGill.

Infant—Investment and application of fund for maintenance and education of.

In this suit a legacy bequeathed to one Sarah Shuter Hall had been paid into court, and the executors of the testator's will discharged from all liability in respect thereof.

S. H Blake, on behalf of the said Sarah Shuter Hall, moved *ex parte* on petition for the investment of the said moneys, and for payment out of the interests or dividends thereon to Sidney Smith, the uncle of the petitioner. The petition was supported by the affidavit of the said Sidney Smith, and it appeared that the said

Sarah Shuter Hall was an infant: that she was in poor circumstances: that she was not able out of her own means to continue and complete her education: that she had lately been removed from school because she was unable to defray the necessary tuition and other fees and charges: that unless the said moneys were invested, and the interest or dividends thereon applied for her support and education that she could not continue or complete her education. In this affidavit Mr. Smith undertook to apply the interest or dividends aforesaid in and towards the support, maintenance and education of the petitioner, if such interests and dividends were paid out to him.

The Judge's Secretary, after consulting the Chancellor of Ontario, granted the prayer of the petition, ordering the said Sidney Smith to account when the petitioner attained her majority for the application of the dividends upon the said fund, which was directed to be invested in Dominion stock—such dividends to be paid out half yearly—the accrued interest since payment of said fund into court to be paid out forthwith to said Sidney Smith.

Re Coleman's Trusts, 1 Irish Eq. 292; *Re McFarlane*, 2 J. & H. 673; *Re Law*, 30 L. T. Ch. 572, were referred to.

McMartin v. Dartnell.

Practice—Affidavit—Erasures and interlineations in—Not properly referred to in notice of action.

Smart, on behalf of the defendants Dartnell and Morland, applied for an order for security for costs against plaintiff. The application was supported by an affidavit of one Edward Taylor Dartnell.

S H. Blake objected to the reading of the affidavit on the ground that there were numerous erasures and interlineations in it, which had not been initialed by the Commissioner before whom the affidavit was sworn, and also that the day upon which said affidavit was filed was not mentioned in the notice of motion.

The Judge's Secretary ordered the original affidavit to be brought before him from the office of Records and Writs. After examination:—The objections are good. Since the year 1860 erasures or interlineations in affidavits had to be initialed. The notice of motion ought to have mentioned the day on which the affidavit was filed, as it had been filed several days before the said notice of motion was served. The objections are fatal and the application must be refused with costs.

Glass v. Moore.

Practice—Order pro confesso—Setting down cause—Decree.

In this suit an order for substitutional service of the bill on the defendant by advertising had been made. The advertisement having been duly published and no answer having been filed although the time limited in that behalf had expired, an application was made to allow the service, the usual material being produced.

The Judge's Secretary.—The practice since the decision of His Honor Vice-Chancellor Mowat in *Mitchell* v. *Ellis* (not reported) has been changed. In mortgage suits, such as this, where the bill has not been personally served, it is not proper to move for allowance of service according to the former practice. When a defendant in such cases is in default for want of an answer, an order *pro confesso* must be taken out, and the cause set down and heard *pro confesso*; instead of taking out a præcipe decree immediately upon the allowance of service, the decree is now made in Court.

DIVISION COURTS.

(In the Fourth Division Court, County of Wentworth, before His Honor Judge Logie.)

Waugh v. Conway.

Division Courts—Jurisdiction—Reduction of claim by payment.

An action on an unsettled account exceeding $200, which was reduced by *payment* to $100, *held*, not to be within the Division Court jurisdiction.

Miron v. *McCabe*, 4 Prac. R. 171, considered.

[Hamilton, 7th Sept. 1868.]

In this action the plaintiff claimed $104 17, gave credit for $3 50, and abandoned 67c., reducing the claim to $100.

The claim was for the amount of an account, one item being "balance of account due on building, $55 17;" the other items being for hay, wheat and lumber sold by plaintiff to defendant. There had been no settlement of the building account, and no admitted balance, on the contrary, every item of that account as well as the account in suit was disputed. The building account was produced, and consisted of a number of items for building materials, teaming and labour, exceeding $200, but reduced by payments to the balance claimed of $55 17. It became necessary, therefore, to prove all the items of the building account, as well as of the other; the two accounts amounting to about $300, when

Wardell for the defendant, contended that the court had no jurisdiction to try the case.

Durand for the plaintiff, cited *Miron* v. *McCabe*, 4 Pr. Rep. 171.

Logie, Co. J.—The 59th section of the Division Courts Act, contains a proviso, that no action shall be sustained for the balance of an unsettled account, where the unsettled account in the whole exceeds $200. Under that proviso I have always held that I had no jurisdiction to try an unliquidated account exceeding $200, though reduced by payment to a sum below $100; the intention of the Legislature apparently being to prevent these small debt courts from investigating large and important transactions. *Miron* v. *McCabe*, 4 Pr. Rep. 171, however, seems to be an authority for the position urged on behalf of the plaintiff, that this court has jurisdiction to try a disputed claim exceeding $200, where it has been reduced to $100 by payment. The point certainly was raised in that case, but it does not seem expressly decided in the judgment; on the other hand in *Higginbotham* v. *Moore*, 21 U. C. Q. B. 326, the court assume as a matter of course, that in such a case the Division Court has no jurisdiction. It was an action to recover the amount of an account and, as amended, the balance due upon two notes, the amount of the notes being reduced by *payment* to the balance claimed; and there the court held that the notes being settled or liquidated amounts, the proviso in the statute did not apply,

the balance due on the notes and the account not exceeding the jurisdiction of the Division Court. Robinson, C. J., in giving judgment says:—"the plaintiff's claim as first delivered in stating an account of which the debit side exceeded £73, stated a case not within the jurisdiction of the court, according to the 59th section, although the balance claimed was only £25—that is if the whole account is to be taken as unsettled, notwithstanding there were among the items two notes, which in themselves were liquidated demands." I have known cases to be brought in the Division Courts for the balance of an unsettled acount exceeding $1000, but reduced by payment to $100; if the Court had jurisdiction in such a case, there would be this anomaly, that a case *could* be tried in a Division Court which would be above the jurisdiction of a higher court, the County Court. The intention of the Legislature to give jurisdiction to the Division Court in such a case as this, must be very clear and decisive of the point, more express than in *Miron* v. *McCabe*, before I would assume the jurisdiction claimed on behalf of the plaintiff.

Gilbert v. Gilbert Executrix of W. Gilbert.

Splitting cause of action.

Claims, such as promissory notes, which would each constitute a distinct cause of action if sued upon directly, become within the rule as to splitting of causes of action in Division Courts, when the nature of the action upon them is changed to an indirect action as for money paid by an endorser to the use of the maker.

[Hamilton, 7th Sept., 1868.]

At the June sittings of the Court, an action was brought to recover the amount of two promissory notes, made by the deceased Wm. Gilbert to other parties; the plaintiff claiming that he had signed the notes as security for Wm. Gilbert, and had to pay them. The claim was allowed to be amended, to one for money paid for the use of the defendant as administratrix, &c. A set-off was put in and proved, and the plaintiff had judgment for a small balance. At the trial the plaintiff produced another note made in the same way, which he said he had paid, but did not give it in evidence. At the last sittings of the court, he brought another action for money paid on that note, and objection was made that he could not recover, on the ground that it was a splitting of a cause of action. For the plaintiff it was contended, that the three notes being all payable to different persons, formed different causes of action, and therefore the plaintiff was entitled to recover.

Logie, Co. J.—In *Wickham* v. *Lee*, 12 A. & E. N. S 526, Erle, J. says:—"It is not a splitting of actions to bring distinct plaints, where in a Superior Court there would have been two counts. I am not sure that the Court of Exchequer puts it so, but that is the true construction of the Act." All the cases on the subject, illustrate the correctness of the rule laid down by Mr. Justice Erle, and I have always acted upon that rule in deciding upon what constitutes a splitting of a cause of action.

In this case the actions are not brought upon the notes directly, for then they would form distinct causes of action, but for money paid by the plaintiff for the use of the defendant in taking up the notes. In a Superior Court there would have been one count for money paid, under which the amounts of the three notes could have been recovered, making one cause of action though the notes were payable to different persons; as in *Grimsby* v. *Aykroyd*, 1 Ex. 479, where the orders were given to different persons, but were held to give only one cause of action. The plaintiff should have sued for the whole at once, and not having done so, he cannot now recover the amount claimed in this action.

ENGLISH REPORTS.

HOUSE OF LORDS.

Routledge et al. v. Low et al.

Copyright—Alien author—Temporary residence in British colony—5 & 6 Vict. c. 45

A domiciled subject of the United States took up her temporary residence in Canada, while a book of which she was the authoress was being published in England by Messrs. S. L. and Co., the respondents. The appellants, Messrs. R. and Co., having subsequently printed and sold copies of the same work, a bill was filed against them to restrain the publication, to which defendants demurred:

Held (confirming the decision of the court below), overruling the demurrer, that under the 5 & 6 Vict. c. 45, an alien friend who first publishes in the United Kingdom a work, of which he is the author, if at the time of publication he is resident in the British dominions, even though such residence should be only temporary: and the fact that the temporary residence is in a colony with an independant legislature, under the laws of which he would not be entitled to copyright, does not prevent his acquiring this privilege.

Per the Lord Chancellor (Cairns) and Lord Westbury, Lords Cranworth and Chelmsford dissenting: The protection of copyright is given to every author who first published in the United Kingdom, wheresoever he may be resident, or of whatever state he may be the subject.

Jefferys v. *Boosey* commented on.

[18 L. T., N. S., 874.]

This was an appeal from a decree of the Lords Justices made on the 24th Nov. 1865, and the question in dispute was, whether an author of a book, who was an alien, and not domiciled within any part of the British dominions, and between whose Government and that of Her Majesty no convention pursuant to the International Copyright Act (7 & 8 Vict. c. 12) was in existence, had acquired, by a temporary residence in a British colony, such residence being during and merely for the purpose of the publication of the book in England, the protection of the law of English copyright. A further question was, whether by the Copyright Act (5 & 6 Vict. c. 45) protection is given throughout all the British dominions, and especially whether it extends to colonies having a local and independant legislature by the statute law of which such alien author acquired no copyright.

The facts were these:—A Miss Cummings, who was domiciled in the United States, transmitted to the respondents, Messrs. Sampson Low, and Co., the MS of a book composed by her, called Haunted Hearts. She then went to Montreal and purposely resided there for a few days, while the book was being published. Immediately after the book had been published in London it was also published in America. Messrs. Routledge and Co. subsequently printed and sold copies of it at the rate of 2*s.* each, Messrs. Low's price being 16*s.* A bill for an injunction was filed to restrain the rule and for an account. The appellants demurred; but the Vice-Chancellor overruled the demurrer, and the injunction was grant-

ed. Messrs. Routledge appealed, and the respondents having, at the suggestion of the Lords Justices, served notice of motion for a decree, the appeal motion and the cause were heard together in Nov. 1865. The Lords Justices made a decree in favour of the respondents: hence the present appeal.

The case is reported in the court below 10 L. T. Rep. N. S. 838, and 33 L. J. 717, Ch.

Sir *Roundell Palmer* and *Shapter*, Q. C. (*Schomberg* with them) for appellants.—The Copyright Act (5 & 6 Vict. c. 45), does not affect Canada, which has a legislature of its own, there is no express mention of Canada in the Act, and general words will not suffice to include it. We had already professed to give up legislating for Canada, by the 3 & 4 Vict. c. 35, and prior to the Copyright Act the Canadians had passed a copyright Act of their own, the terms of which the authoress in the present case had not complied with. Under the Canadian Act, she is not entitled to copyright, but if the decision of the Lords Justices be upheld she will obtain it under 5 & 6 Vict. c. 45 in direct contravention of the Canadian Act. It is a well-known principle of law that where there is a general and special statute, and the provisions of the one are not consistent with the provisions of the other, that the special statute ought to prevail, therefore in this case the Canadian Act must be held to govern the respondents claim: (*Fitzgerald* v. *Champneys*, 2 Jo. & H. 31, 55; 30 L. J. N. S. 777, Ch.) The remarks of Lord Cranworth in *Brook* v. *Brook*, 9 H. of L. Cas. 193, 222, in reference to the limitation of the operation of the 5 & 6 Will. IV, c 54, may be applied with advantage to the present Act. A foreigner residing in Canada cannot be held to be a British subject within the meaning of the Copyright Act; the only claim to the rights of a British subject that the respondent has, is derived from the temporary residence in a British colony. Such local presence can only confer local and temporary rights, not the full rights of a British subject, unless by express enactment of the British Legislature. We have a national and also an international code affecting this subject, and this of itself is a proof that the statute was meant to benefit only *bonâ fide* subjects of the Crown. This Act cannot be supposed to be incorporated in the law of Canada; its provisions are entirely local. Penalties are to be recovered in the courts of the United Kingdom; copies of new works are to be delivered within a month at the British Museum, and in fact its provisions generally keep in view the state of things in the United Kingdom. This case, then, is governed by the decision in *The Attorney General* v. *Stewart*, 2 Mer. 143. *Jefferys* v. *Boosey* decided that the author must be either a British subject or an alien residing in the United Kingdom. The language of the Statute of Anne (8 Anne, c. 19) is not enlarged by the present statute. *Oilendorf* v. *Black*, 4 DeG. & S. 209; 20 L. J. 162, Ch., the decision turned entirely on a *bonâ fide* residence in England.

Mellish, Q. C. and *Speed* (with them *Hardy*) for respondents.—The present Act expressly repeals the Act of Anne. The object of the present statute, which is clearly shown by its preamble, is to extend copyright in order to afford greater encouragement to literature The question here is, who is an author? There are no words of limitation in the present Act with regard to it; it refers then to everyone who is an author, no matter what his nationality. Is an alien friend who comes into any part of the British dominion entitled to the benefit of this statute? The other side say that the respondent could only become entitled to the rights conferred by the Canadian law, but Canadian laws are of two sorts, one class being those enacted by the Imperial Legislature. Why then should an alien be restricted to the advantages of those alone which are enacted by the colonial Legislature? This Act applies to all persons residing within its scope, and it is clear from the Act itself that it extended to Canada. It was laid down by Lord Cranworth in *Jefferys* v. *Boosey*, that a residence of a single day was sufficient, and that under the Copyright Acts there was no distinction between temporary and permanent residence. But the present Act goes still further, and under it there can be no doubt that not only is a foreigner resident in England or within the British dominions entitled to copyright, but a foreigner resident abroad is also equally entitled to it, so long as he first publishes in England, which is the gist of the whole Act, and complies with the provisions of the 24th section. The opinion to the contrary expressed in *Jefferys* v. *Boosey* had nothing to do do with the *ratio decidendi*, which went entirely on the fact that the publication was not made by the author at all, but by a person to whom he had assigned; but that case was decided under the statute of Anne, and is no longer law. Under the present statute author is not confined to British subjects, but even if it were, Miss Cummings at the time of publication was temporarily a subject of the British Crown. It is admitted that an alien resident in England is an author within the Act. There can be no distinction in the position in law of an alien resident in England and and an alien resident in Canada. She was entitled to all the rights of a British subject except those from which aliens are specially excluded: *Calvin's case*, 7 Rep. 17b; 7 & 8 Vict. c. 66, s. 4

They referred also to *D'Almaine* v. *Boosey*, 1 You. & C. 288; 4 L. J. N. S., Exch. Eq. 21; *Bentley* v. *Foster*, 10 Sim. 329; *Cocks* v. *Purday*, 5 C. B. 860, 17 L. J., N. S., 273, C. P.; *Boosey* v. *Davidson*, 4 Ex. 145, 18 L. J., N. S., 174, Q. B; *Boosey* v. *Purday*, 4 Ex. 145; 18 L.J., N. S., 378, Ex.

Sir *R. Palmer* in reply.

The Lord Chancellor.—In this case a decree was made in the Court of Chancery by Vice-Chancellor Kindersley, and affirmed by the Lords Justices, protecting in the usual way the copyright is a work called "Haunted Hearts," and Messrs. Routledge, against whom this decree was made, complain of it and appeal from it to your lordships. The book or work called "Haunted Hearts" was composed by the respondent, Maria Susanna Cummings. Miss Cummings is a domiciled citizen of the United States of America; but before she published the work she went by arrangement to Montreal, in Lower Canada, for a few days, and while sojourning there the book was published in London on the 28rd May 1864. The book was published by the respondents, Messrs. Sampson, Low and Co., and the copyright of the work, if copyright existed, was

duly assigned to them, and proper entries as to the copyright and the assignment were subsequently made at Stationer's Hall. The precise case, therefore, which your lordships have to consider, is whether an alien friend, publishing in London during the time of his or her temporary sojourn in a British colony or possession, an original work, is entitled to the protection of the English law as to copyright? The appellants maintain the negative, the respondents, the affirmative, of this proposition. This is a question of importance to the parties to this litigation; but even beyond the interests of the parties to this appeal, it is of great general importance that there should be no doubt or misapprehension as to the law on the subject. The great object of the law of copyright is to stimulate by means of the protection secured to literaray labour the composition and publication to the world of works of learning and utility; and the accomplishment of this object would be seriously thwarted by any want of clearness as to the terms on which, or the persons to whom, this protection is intended to be given. The statute applicable to this case is the 5 & 6 Vict. c. 45. It is not an Act by way of supplement to any former statute. It repeals the former statutes as to the copyright, and it proceeds upon the recital "that it is expedient to amend the law relating to copyright and to afford greater encouragement to the production of literary works of lasting benefit to the world." There are three questions arising upon this statute which I will ask you to consider; and the answer to them will, as it seems to me, dispose of the controversy in the present case. First, where, in order to obtain a title of copyright, must the publication of the work take place? second, what is the area in and throughout which the protection of copyright is given? and, thirdly, who is the person entitled to this protection? As to the question, where must publication take place, I cannot doubt that the publication must be in the United Kingdom. The words in the 3rd section are: "Every book which shall be published," without saying where; but it would be very inconsistent with the usual practice of the Imperial Parliament to create a system of copyright law for all the colonies and dependencies in the Empire, many of which have representative institutions of their own, without any consultation with those colonies or dependencies, and without any consideration whether an uniform and arbitrary system such as that introduced by this Act, would be suitable to the varied circumstances, states of naturalisation, and systems of jurisprudence and judicature, in these different colonies and possessions. But there are, as it seems to me, still clearer indication in the Act of the intention of the Legislature on this point. By the 8th clause copies of every book are to be delivered to various public libraries in the United Kingdom within one month after demand in writing, an enactment which, in the case of a publication at the Antipodes, could not be complied with. By the 10th section, penalties for not delivering these copies are to be recovered before two justices of the county or place where the publisher making default shall reside, or by action of debt in any court of record in the United Kingdom. By the 11th section the book of registry of copyrights and of assignments is to be kept at Stationers'-hall in London, and no registry is provided for the colonies. By the 14th section a motion to expunge or vary any entry in this regstry, it to be made in the Court of Queen's Bench, Common Pleas, or Exchequer. These clauses are intelligible if the publication is in the United Kingdom, but hardly so if it may be in India or Australia. Finally, in the 17th section, there is a provision against any person importing into any part of the United Kingdom, or any other part of the British dominions, for sale or hire, any copyright book first composed, or written, or printed and published, in any part of the United Kingdom, and reprinted in any country or place out of the British dominions; a provision showing clearly, as it appears to me, that publication in the United Kingdom is indispensable to copyright. I have gone into this detail as to the place of publication, not so much because any difficulty on that score arises in the present case, for the publication here was in London, as because I observe that Kindersley, V. C. appears to have thought that the whole of the British dominions are, by the Act, brought into what he terms a "ring fence" for every purpose of copyright, including publication. I am unable to take this view of the Act. The 6th section no doubt affords some countenance to this construction, for it provides for the delivery to the British Museum of a copy of every book published after the Act; the delivery to be within one or three months if published within the United Kingdom, or within twelve months after publication in any part of the British dominions. But, my Lords, I cannot look on this section as thro wing any light on the definition of copyright, or, indeed, as necessarily connected or correlative with copyright. It appears to me to have been introduced into the Act with the intention (whether that intention has succeeded or not is not now the question) of obtaining for the British Museum a copy of every book published anywhere under British rule, and whether there should be copyright in the book or not. The second question is as to the area over and through which protection is granted by the Act, and I cannot doubt that this area is the whole of the British dominions. The original Copyright Act (the 8 Anne, c. 19) protected copyright throughout Great Britain. The 48 Geo. 3, c. 107, extended this protection over the whole of the United Kingdom and the British dominions in Europe. The 54 Geo. 3, c. 156, extended the protection still further over the whole of the British dominions; and the 15th section of the the present Act repeats in substance the same area for the purpose of protection. I think, further, it is obviously with reference to the protection given by the Act, and the area over which that protection is given, that the 59th section provides that the Act should extend to the United Kingdom, and to every part of the British dominions. I come now to the third question, the most important one for the determination of the present case. To whom, as the composer or author of a work, is this protection given—to a native-born subject of the Crown; to an alien friend sojourning in the United Kingdom; to an alien friend sojourning in a colony; or to an alien friend resident wholly abroad? In my opinion the protection is given to every author who publishes in the United

Kingdom, wheresoever that author may be a resident or of whatever state he may be the subject. The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. The benefit is obtained in the opinion of the Legislature by offering a certain amount of protection to the author, thereby inducing him to publish his work. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the Legislature is to increase the common stock of the literature of the country, and if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions, which should entitle such a person to the protection of the Act in return and compensation for the addition he has made to the literature of the country. I am glad to be able to entertain no doubt that a construction of the Act, so consistent with a wise and liberal policy, is the proper construction to be placed upon it. My lords, as opposed to this conclusion we were much pressed with the case of *Jefferys* v *Boosey*, decided by this House (8 H. of L. Cas.). That case was decided not upon the old Copyright Act of Queen Anne; on the construction of that Act six of the learned judges who advised your lordships were of opinion that a foreigner living at Milan, and composing a literary work there, could convey a title of copyright by assignment, under which his assignee, publishing here, was entitled to protection. Four of the learned judges were of different opinion, and your lordships unanimously held that the foreigner in that case could not give a title of copyright, and this must be taken to be the construction and effect of the statute of Anne. But it is impossible not to see that the *ratio decidendi* in that case proceeded mainly, if not exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the Legislature of Great Britain at that period. The present statute has repealed that Act and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world. And accepting the decision of this House as to the construction of the statute of Anne, it is, I think, impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of Anne. If you concur in this construction of the statute now in force, the respondent will clearly be entitled to our judgment, and I propose to move that the decree of the Court of Chancery should be affirmed, and the appeal dismissed with costs.

Lord Cranworth.—I concur with my noble and learned friend in thinking that this appeal should be dismissed with costs. But in so concurring I must guard myself against being taken as assenting to the suggestion of my noble and learned friend, that the Act now regulating copyright (5 & 6 Vict. c. 45) must be taken as extending its privileges to all authors, aliens as well as natural born subjects, who publish their works for the first time in this country. It is not necessary to come to such a conclusion in order to support the decree appealed from. It is remarkable that the modern statute, though it repeals all the former statutes, nowhere defines or declares what is to be understood by the word "copyright." It assumes copyright to be a well known right, and legislates in respect to it accordingly. I suppose, that copyright, except so far as it is extended expressley or impliedly by the language of the Act, must be taken to be confined to what it was at the passing of the Act, that is, to works first published in the United Kingdom. But I think it is a reasonable inference, from the provisions of the Act, that its benefits are conferred on all persons resident in any part of Her Majesty's dominions, whether aliens or natural born subjects, who while a resident publish their works in the United Kingdom. This was the case of Miss Cummings, and it is not necessary to say whether it extends further; though there seem to me to be reasons almost irresistible for thinking that it does not. She was a foreigner resident at Montreal, and while so resident, she published her work in London, which was its first publication, and that was, I think, sufficient to entitle her to the protection of the statute. The decision of your Lordships' house in *Jefferys* v. *Boosey*, according to the opinions of all the noble Lords who advised the House on that occasion, rested on the ground that the statute of Anne then alone in question must be taken to have had reference exclusively to the subjects of this country, including in that description foreigners resident within it, and not to have contemplated the case of aliens living abroad beyond the authority of the British Legislature. The British Parliament in the time of Queen Anne must be taken *primâ facie* to have legislated only for Great Britian, just as the present Parliament must be taken to legislate only for the United Kingdom. But though the Parliament of the United Kingdom must *primâ facie* be taken to legislate only for the United Kingdom, and not for the colonial dominions of the Crown, it is certainly within the power of Parliament to make law for every part of Her Majesty's dominions, and this is done in express terms by the 29th section of the Act now in question. Its provisions appear to me to show clearly that the privileges of authorship which the Act was intended to confer or regulate in respect to works first published in the United Kingdom, were meant to extend to all subjects of Her Majesty in whatever part of her dominions they might be resident, including under the term subjects, foreigners residing there, and so owing to her a temporary allegiance. That Her Majesty's colonial subjects are by the statute deprived of rights they would otherwise have enjoyed is plain, for the 15th section prohibits them from printing or publishing in the colony whatever may be their own colonial laws, any work in which there is copyright in the United Kingdom. It is reasonable to infer that the persons thus restrained were intended to have the same privileges as to works they might publish in the United Kingdom, as authors actually resident therein. And, threfore, I have no hesitation in concurring with my noble and learned friend in thinking that the decree

was right. I find it difficult to concur with him in the opinion that the present statute extends its protection to foreigners without saying that the case of *Jefferys* v. *Boosey* is not good law, a conclusion at which I should be very unwilling to come as to any case decided in this House, more especially as to one so elaborately considered as that of *Jefferys* v. *Boosey*, that case, as my noble friend has pointed out, was decided not on the construction of the Act of the 5 & 6 Vict. c. 45, but on the old statute of Queen Anne; but I own I do not, as at present advised, see any difference between the two statutes, so far as relates to the subject of foreign authors. I have felt it my duty to make these remarks, in order that I may not be taken to have accepted my noble and learned friend's exposition of the present statute as to foreign authors. If any question as to their rights should come before this House for decision, I wish to keep my judgment open on the point. In the present case, as I have already stated, I concur with my noble and learned friend in thinking that the present appeal should be dismissed with costs.

Lord Chelmsford.—The case of *Jefferys* v. *Boosey* finally decided that the statute of 8 Anne gives the copyright in a work only to British subjects or to foreign authors who at the time of the first publication are in this country. The direct subject of decision in that case was that a foreign musical composer resident abroad, having assigned his right in a musical composition of which he was the author to another foreigner who brought it to this country, and before publication assigned it, according to the forms required by law, to an Englishman, no assignable copyright in this musical composition existed in England. There can be no doubt from what was said by the learned judges who assisted, and by the noble Lords who advised the House in *Jefferys* v. *Boosey*, that if the foreign musical composer had himself brought his composition here, even though he came to this country solely with a view to publication, he would have entitled himself to copyright. Copyright under the statute of Anne was confined to Great Britian. Therefore, under this statute, in order to qualify himself to claim a copyright for any work which he had composed but not published abroad, a foreigner must at the time of its first publication have been resident within some part of the area over which the copyright extended and to which it was limited. But it was said that before the case of *Jefferys* v. *Boosey*, the copyright under the statute of Anne had been extended by the 41 Geo. 3, to "all the British dominions in Europe," and by the 54 Geo. 3, "to all the ports of the British dominions," and therefore the decision in that case that the foreign author of a work must have been resident in Great Britain to entitle him to copyright, necessarily excluded the sufficiency of a residence in any other part of the Queen's dominions. But the Acts of 41 Geo. 3, and 54 Geo. 3, gave no actual extension to the area of copyright, which was limited by the 8th of Anne. Practically, no doubt, when persons are prohibited from publishing a work in a particular place, and an action is given to the author of the work against them for doing so, he has a monopoly of the right of publication in that place. Yet strictly speaking his copyright under the statute is not thereby enlarged; but for its better protection a remedy is given for an infringement beyond the limits to which it extends. It is obvious that for the purpose of copyright a provision of this description cannot give any effect to a residence in any part of the Queen's dominions out of Great Britain which it did not possess before. It having been settled that the term "author" in the statute of Anne is only applicable to a foreigner when he is resident in Great Britain, the question to be determined in this case is whether the statute of 5 & 6 Vict. c. 45 has not given that term a more extensive application. By the 29th section it is enacted "that this Act shall extend to the United Kingdom of Great Britain and Ireland, and to every part of the British dominions." This section of the Act requires for its full effect that the area over which copyrights prevail should be limited only by the extent of the British dominions. But then it will follow that the term "author" must have a similar extension. For in the case of *Jefferys* v. *Boosey* it was not doubted that the term author, though intended to express a British subject, would apply to a foreigner taking up his residence within the limits to which copyright extended under the 8th Anne. And those limits being now enlarged by the 5 & 6 Vict., the residence which confers the rights of a British subject as to copyright upon a foreigner may be in any part of the Queen's dominions. It was admitted in argument that a resident native of Canada would be entitled to the benefit of an English copyright? What reason is there for denying to a foreigner resident in Canada the privileges in this respect of a native Canadian? There is a little difficulty in determining where the publication which confers the extensive privilege of copyright under the Act must take place. The 6th section requires a copy of every book to be deposited in the British Museum within one month after it shall be first published within the bills of mortality, or within three months if published in any other part of the United Kingdom, or within twelve months if published in any other of the British dominions. This section seems to refer to publications to which the privilege of copyright attaches, and consequently to contemplate the acquisition of this privilege by the first publication of a work out of the United Kingdom. But there are provisions in the Act which impose conditions upon a publisher entitled to copyright wholly inapplicable to publications in some distant part of the British dominions. And a non-compliance with these conditions exposing the publisher to penalties which are to be recovered either in a summary way on conviction before two justices of the peace for the county or place where he resides, or by action in any court of the United Kingdom, it seems to me to be clear, notwithstanding the language of the 6th section, that the only publication which entitles a publisher to copyright is that which takes place within the United Kingdom, although when obtained it exists throughout the whole of the British dominions. Our attention was called to a local law of Canada with regard to copyright; but it was not contended that it would prevent a native of Canada from acquiring an English copyright which would extend to Canada, as well as to all other parts of the British dominions, although the requisitions of the Canadian law had not been

complied with. It is unnecessary to decide what would be the extent and effect of a copyright in those colonies and possessions of the Crown which have local laws upon the subject. But even if the statute of 5 & 6 Vict. applies at all to the case, I do not see how such a copyright can extend beyond the local limits of the law which creates it. My noble and learned friend upon the woolsack has expressed an opinion that the statute of 5 & 6 Vict. has extended the privilege of copyright to an alien publisher who is resident wholly abroad. With the most sincere respect for this opinion, I cannot help entertaining a doubt whether it is well founded. If any stress is to be laid upon the preamble of the statute, it does not appear to me to differ very widely from that in the statute of Anne. One of the objects proposed by the statute of Anne is to encourage "learned men to compose and write useful books." The object of the 5 & 6 Vict. is expressed to be "to afford greater encouragement to the production of literary works of lasting benefit to the world." If, therefore, the statute of Anne did not confer the privilege of copyright upon an alien publisher residing abroad (which after the case of *Jefferys* v. *Boosey*, it must be taken not to have done, I cannot find anything in the 5 & 6 Vict., which appears to me to warrant the extension of its benefits to such a publisher. But it is unnecessary to consider this question more fully with a view to the determination of the present case. It is sufficient to say that copyright being extended to every part of the British dominions, the residence of Miss Cummings, the authoress of the work in question, in Canada, conferred upon her the same title to copyright upon the first publication of her work in England as a similar residence in the United Kingdom would have done; and, therefore, that in my opinion the decree appealed from ought to be affirmed and the appeal dismissed with costs.

Lord Westbury.—The case of *Jefferys* v. *Boosey* is a decision which is attached to and depends on the particular statute of which it was the exponent; and as that statute has been repealed and is now replaced by another Act, with different enactments, expressed in different language, the case of *Jefferys* v. *Boosey* is not a binding authority in the exposition of this later statute. In the arguments on the construction of the existing Act it has been admitted (and I think rightly) that the benefit of the copyright which the Act creates extends to such works only as are published within the United Kingdom. This results from various provisions and conditions contained in the Act, which could not possibly be complied with if the first publication were to take place in distant parts of the British empire. But although for the creation of copyright it is necessary that the work be first published within the United Kingdom, yet, by the express words of the statute, the copyright, when created, extends to every part of the British dominions. This is the benefit which, by the words of the Act, is offered to authors, who shall first publish their works within the United Kingdom. The question then arises who are included in the term "authors." The word is used in the statute without limitation or restriction. It must, therefore, include every person who shall be an author, unless from the rest of the statute sufficient grounds can be found for giving the term a limited signification. It is proposed to construe the Act as if it had declared in terms that the protection it affords shall extend to such authors only who are natural-born subjects, or of foreigners who may be within the allegiance of the Queen on the day of publication. But there is no such enactment in express terms, and no part of the Act has been pointed out as requiring that such a construction should be adopted. The Act appears to have been dictated by a wise and liberal spirit, and in the same spirit it should be interpreted, adhering of course to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of learning in every country to make the United Kingdom the place of first publication of their works; and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing. So interpreted and applied, the Act is auxiliary to the advancement of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his works in the United Kingdom. Nothing renders necessary his bodily presence here at the time, and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication. It was asked in *Jefferys* v. *Boosey*, why should the Act (meaning the Statute of Anne) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present Act, the answer is in the language of the preamble that the Act is intended "to afford greater encouragement to the production of literary works of lasting benefit to the world"—a purpose which has no limitation of person or place. But the Act secures a special benefit to British subjects by promoting the advancement of learning in the country, which the Act contemplates as the result of encouraging all authors to resort to the United Kingdom for first publication of their works. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term "author" a restricted signification, to find in the statute the reason for so doing. If the intrinsic merits of the reasoning on which *Jefferys* v. *Boosey* was decided, be considered (and which we are at liberty to do, for in this case it is not a binding authority), I must frankly admit that it by no means commands my assent. I abstain from criticising the arguments in detail, for the process could hardly be consistent with the great respect due to the judicial opinions delivered by your Lordships. The sum of the whole reasoning is the conclusion that a British statute must be considered as legislation for British subjects only; unless there are special grounds for inferring that the statute was intended to have a wider operation. But by the common law of England, the alien freind (*ami*) though remaining abroad, may acquire and hold in England all kinds of pure personal property, and when a statute is passed which creates or gives peculiar protection to a particular kind of

property which it declares shall be deemed personal property, and does not exclude the alien, why is he to be deprived of his ordinary right of possessing such property, or being entitled to such protection? It is said that the statute is intended for the benefit of British subjects; and that is given as the reason for the decision which involves this consequence, viz., that a British subject who has bought an unpublished work from a foreign author residing abroad, and then publishes it in conformity with the statute, shall have no property in that which he has bought and paid for, unless the foreign author happens on the day of publication to be bodily present for a few hours within some part of the British dominions. Surely this construction is injurious to the interest of the English subject? For these reasons, and not on the narrow ground that the foreign authoress of this work crossed the English border and stayed for a few hours on British ground during the day of first publication, in order that her assigns might escape from the limited views expressed in *Jefferys* v. *Boosey*, I am of opinion that this decree ought to be affirmed, and the appeal dismissed with costs.

Lord Colonsay.—My Lords, I concur with all your Lordships in thinking that this appeal ought to be dismissed. I have no doubt at all that in order to obtain the protection of copyright, the first publication must be within the United Kingdom. I have also no doubt that the area of protection extends over the whole British dominions; and, thirdly, I have no doubt that an author residing at the time of publication within any portion of the British dominions, although that author may be a foreigner, is entitled to the benefit of the protection. A more liberal view of the statute has been suggested, and it is an important one; but after the difference of opinion that I have heard expressed with regard to it, not having considered, in my deliberation upon this case, that a judgment upon that point was necessary to the solution of the question now before the House, I respectfully beg to abstain from expressing any opinion upon it, although I can easily see that there is very little benefit to be gained to British authors by refusing to extend the protection of copyright in the manner suggested, because nothing can be more shadowy than a distinction depending upon the circumstance of a few hours' or a few days' residence within some part of the widely-extended dominions of Her Majesty. But it is not upon considerations of that kind that we must decide this case, it is upon the ground that the right only exists by statute, and as I have not directed my attention to that matter, feeling it to be unnecessary to the decision of this case, I rather abstain from expressing any opinion one way or the other.

Decree affirmed, and appeal dismissed with costs.

CROWN CASES RESERVED.

Reg v. Glyde.

Larceny—Finding lost property—Belief that owner will come forward.

Where a man found a sovereign on the highway, and, with a knowledge that he was doing wrong, at once determined to appropriate it, whether the owner came forward or not, and did so; but, also, at the time of finding, believed the sovereign to have been accidentally lost, and had no reason to suppose or believe that the owner would become known to him, it was

Held, on the authority of *R* v. *Thurborn*, 1 Den. 387, that he was not guilty of larceny.

[16 W. R. May 30, 1174.]

Case reserved by Cockburn, C. J.:

William Glyde was convicted before me at the last assizes for the county of Sussex on an indictment for larceny, in which he was charged with having stolen a sovereign, the property of Jane Austin.

It appeared that, on the evening of the 16th January last, the prosecutrix, being on her way home from Robertsbridge, where she had been to pay some bills, to her home at Brightling, and having some money loose in her hand, had occasion, owing to the dirty state of a part of the road, to hold up her dress, and in doing so let fall a sovereign. It being then dark, she did not stop to look for the sovereign, but on the following morning she started to go to the spot in the hope of finding the lost coin. In the meantime the prisoner, coming from Robertsbridge towards Brightling, in company with a man named Hilder and his son, and seeing, at the spot where the prosecutrix had dropped her sovereign, a sovereign lying in the road, picked it up and put it in his pocket, observing that it was a good sovereign and would just make his week up.

Proceeding onwards the men soon afterwards met the prosecutrix, then on her way to the spot where the sovereign had been dropped. According to her statement, on meeting the men, she addressed Hilder, whom she knew, and asked in the hearing of the prisoner, "if he had stumbled on a sovereign," stating that she had lost one and was going to look for it, to which inquiry Hilder answered in the negative. She was however, contradicted by Hilder, and his son, who were called as witnesses for the prosecution, as to any such conversation having taken place. But it was clear that the fact of the sovereign thus picked up by the prisoner being one which had been lost by the prosecutrix was speedily brought to the prisoner's knowledge. The fact of the prosecutrix having lost a sovereign and of the prisoner having found one having come to his master's ears—the master asked him if he had found a sovereign, to which he answered that he "was not bound to say." The master further asked if he had not heard that Mrs. Austin had lost one, to which the prisoner made the same reply. On the master asking whether it would not be more honest to give the sovereign up to her, he answered that "he could just manage to live without honesty."

Being asked by a police constable whether he remembered going up the Brightling road, and picking up a sovereign, he answered, "I do not know that I did." On the officer saying "I have been informed by witnesses that you did so, and if you did it did not belong to you—more particularly as you know to whom it belonged," the prisoner said he did not want to have anything more to say to the officer, and went into his house. On a subsequent occasion, however, he admitted to the same witness that he had picked up the sovereign.

The witness Hilder also stated that the prisoner afterwards came to him and asked him if he could say that he (prisoner) had picked up a

sovereign, and on receiving an answer in the affirmative, said that if that was so he must go and see the prosecutrix, who had applied to him several times, about it.

In summing up to the jury on this state of facts, I told them that where property was cast away or abandoned, any one finding and taking it acquired a right to it, which would be good even as against the former owner, if the latter should be minded to resume it. But that when a thing was accidentally lost, the property was not divested but remained in the owner who had lost it, and that such owner might recover it in an action against the finder. As to how far larceny might be committed by a person finding a thing accidentally lost, it depended on how far the party finding believed that the thing found had been abandoned by its owner or not. That where the thing found was of no value, or of so small value that the finder was warranted in assuming that the owner had abandoned it, he would not be guilty of larceny in appropriating it; or if, not knowing or not having the means of discovering the owner, the finder, from the inferior value of the thing found, might fairly infer that that the owner would not take the trouble to come forward and assert his right, so that practically there would be an abandonment, and so believing appropriated the thing found as virtually abandoned by the owner, he would not be guilty of larceny. So, although the value of the article might render it impossible in the first instance to presume abandonment by the owner, yet if, from the fact of no owner coming forward within a sufficient time, the finder might reasonably infer that the owner had abandoned and given up the thing as lost, there would be no criminality in an appropriation of it by the latter.

On the other hand, I pointed out that there were things as to which it could not be supposed that they had been intentionally abandoned, or the owner be supposed to have given up his property: thus, *e.g.*, a purse of gold, or a pocket-book containing bank notes, found in the road, could not possibly be supposed to have been intentionally placed there; or a diamond ornament, found outside the door of an assembly room, to have been intentionally dropped by the lady who had worn it, or a box or parcel left in a public conveyance or a hack cabriolet, to have been left with the intention of abandoning the property. That in all these cases as the property remained in the owner, and the presumption of abandonment was plainly negatived by the circumstances, a person finding such an article and appropriating it to himself with an intention of wronging the owner, if he knew who the owner was, or had the means of finding the owner—as where the name of and address of the owner were on the thing found—or had the means of ascertaining the owner, as in the case of a cabman who knew the house at which he had taken up or set down a person by whom an article must have been left in the carriage—would clearly be guilty of larceny. And even where the finder did not know the owner, if the nature of the thing found precluded the presumption of abandonment, and gave every reason to suppose that the owner would come forward and assert his claim, and the finder nevertheless determined to appropriate the chattel, and to keep it though he should afterwards become aware who the owner was, this too, if done with the intention of wrongfully depriving the unknown owner of property, which the finder knew still to belong to him, would be larceny, provided such intention was contemporaneous with the original taking of possession.

I told the jury that while, to constitute larceny in appropriating an article thus found, there must be a guilty intention of taking that which was known to belong to some one else, and which the party appropriating knew he had no right to treat as his own, this intention may be gathered from the value of the article and the other circumstances of the case, especially the conduct of the party accused, as to concealment or otherwise.

In this respect, I told them they might properly take into account the conduct of the prisoner Glyde in maintaining silence when he heard the question put by the prosecutrix to Hilder, if they believed that portion of her evidence; or, at all events, in refusing to say whether he had found a sovereign or not, and only acknowledging it when Hilder had told him he was prepared to speak to the fact.

As the result of this reasoning, I left it to the jury to say whether the prisoner, on finding the sovereign, believed it to have been accidentally lost, and nevertheless with a knowledge *that he was doing wrong*, at once determined to appropriate it to himself, and to keep it, notwithstanding it should afterwards become known to him who the owner was. I told the jury, if they were of that opinion, to find the prisoner guilty. But inasmuch as there was nothing to show that the prisoner, on appropriating the sovereign on finding it, had any reason to suppose that the owner would afterwards become known to him (or any belief that he would), I doubted whether an intention on his part of keeping it even if the owner should become known to him—he not believing that the latter event would come to pass—would amount to larceny. I therefore thought it right to take the opinion of this Court whether the conviction can be sustained on the facts I have stated.

The jury having found the prisoner guilty, I admitted him to bail, on his own recognizances to come up for judgment at the next assizes, if required so to do. Had I passed sentence at the time, I should have condemned him to imprisonment and hard labour for one calender month.

No counsel appeared for the prisoner.

Lumley Smith for the prosecution.—In *R.* v. *Moore*, 9 W. R. 276, 1 L. & C. 1, 30 L. J. M. C. 77, where a shopkeeper appropriated a note dropped in his shop, he was convicted, and that case differs from the present mainly in the fact that there the jury found specifically that when he picked up the note he believed the owner could be found. [Blackburn, J.—In that case, Wightman, J., referring to *R.* v. *Thorburn*, 18 L. J. M. C. 140, 1 Den. 387, asks if there is any case of a conviction being quashed where the three ingredients concur—first, that the prisoner intended to appropriate the property from the first; second, that he believed at the time he took it that the owner could be found; third, that he acquired the knowledge of who the owner was before the conversion. It, therefore,

comes to this, whether a conviction can be supported where the first and third ingredient concur, but not the second] *R.* v. *Preston*, 21 L. J. M. C. 41; *R* v. *Peters*, 1 C. & K. 245. [WILLES, J.—You are going back to the deluge.] [MARTIN, B.—How can you make a man's mind worse than it is here?] [COCKBURN, C. J.—This is not the case of a man finding a thing, and, without either supposing the owner will turn up, or believing he will not turn up, appropriating it; but where the finder appropriates, not supposing the owner will turn up, but from the first determining to appropriate the lost property whether he does or not] The law upon the subject as laid down in *Thurburn's case*, *supra*, is unsatisfactory, as is pointed out in Russell on Crimes, vol. 2, p. 180, 4th ed., by Greaves. It is not to be supposed here that there was any abandonment, and, unless there was, this was larceny within the definition in Bracton, book 3, c. 32, f. 150.

COCKBURN, C. J.—We are of opinion that this is not larceny. The question seems to turn upon whether the finder of the lost property supposes at the time that it is abandoned by the owner. Where the lost property is such as it was in the present case, it may be doubtful whether the owner will come forward or not. Suppose a case where it is doubtful whether the owner will come forward, as where, having regard to the value of the property, it is to be supposed that a poor man would make search for it, but that a rich one would not, and a person finding it doubts whether the owner will come forward, but yet knows that the property is not abandoned, and resolves, nevertheless, even if he does so, to deny that he has it in his possession, and to appropriate it, and does convert it with that intention, that might be larceny. But the rule in *Thurburn's case* does not go to that length. Here there is nothing to show that the prisoner had reason to believe the true owner would come forward. I think, therefore, that it is not within *Thurburn's case*. If the matter was one of greater magnitude, it might be worth while to reconsider that case.

MARTIN, B.—I agree; but, except for the authority, I should have said that this was larceny—where a man takes the property, resolving to appropriate it whether the owner came forward or not. I think, however, we ought not to overrule *Thurburn's case*.

WILLES, J.—I concur, and think that *Thurburn's case* is in point, and should govern this, and I have too much respect for the learned judge who delivered the judgment in that case to suppose that it was not well decided.

BRAMWELL, B., concurred.

BLACKBURN, J.—I should wish the law to be as my brother Martin would have it, but doubt whether the intervention of the Legislature would not be required to alter the law as it stands at present. Until reversed, the case is governed by Thurburn's.

Conviction quashed.

QUEEN'S BENCH.

READ v. GREAT EASTERN RAILWAY COMPANY.

Negligence—Action by executor—Lord Campbell's Act (9 & 10 Vict. c. 93)—Accord and satisfaction with deceased.

To an action by an executor under Lord Campbell's Act for negligence of the defendants, whereby the deceased lost his life, the defendants pleaded on accord and satisfaction with the deceased in his lifetime.

Held, on demurrer, a good plea.

(Com. Law, W. R., June 25, 1868.)

Declaration by the plaintiff, as widow and executor of D. Read, deceased, for negligence, by reason of which the deceased lost his life.

Plea.—That in the lifetime of D. Read the defendants paid to him and he accepted a sum of money in full satisfaction and discharge of all claims and causes of action he had against the defendants.

Demurrer and joinder in demurrer.

By 9 & 10 Vict. c. 93 (Lord Campbell's Act), s. 1, it is enacted that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, if such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Codd in support of the plea.—This action is a new remedy, and not the same as that which accrued to the deceased; *Blake* v. *Midland Railway Company*, 18 Q. B. 93; *Pym* v. *Great Northern Railway Company*, in error, 11 W. R. 922, 32 L. J. Q. B. 377. [LUSH, J.—If the deceased had brought an action and recovered, could the executor subsequently recover?) I must go as far as that. Accordingly, satisfaction with deceased is no bar to the fresh cause of action in the representatives, and the language of the Act seems to show that on death a new right springs up.

Philbrick, *contra.*—The plea is in respect of all claims for and in respect of all causes of action. There are no words in the statute giving the new right; all they give is an extended right of action to the executor in consequence of the death and the damage therefrom, for which the deceased himself could not recover. The assessment of damages on a different principle in the two actions does not show any right to bring both. There is no new cause of action arising from the original wrong. The words "persons who would have been liable if death had not ensued" point to a continuing liability.

Codd in reply.—This case fits in with every word of the section.

BLACKBURN, J.—I think this plea is good. Before Lord Campbell's Act the maxim "*actio personalis moritur cum persona*" applied to such a case, and the preamble to that Act points to the cases in which the wrong-doer escaped from liability. But here, taking the plea to be true, the Act would not have enabled the party injured to maintain an action because he had accepted an accord and satisfaction. In the second section the principle upon which the jury may give damages, and the persons to whom they

are to go, are new; but there is not otherwise a new cause of action. It would be straining the statute to hold that after the injured party has recovered the executor may recover also.

Lush, J.—The structure of the 1st section shows that it was not the object of the statute to make the wrong doer pay twice over, but only to give to the executor a right to sue where there was a cause of action existing at the time of death, which was prevented from taking effect by the maxim *actio personalis moritur cum persona*. It is true that the measure of damages is different, and in that sense the action is new, but not otherwise.

Judgment for defendant.

Williams v. Earle.

Lease—Covenant not to assign without license—Covenant running with land.

A covenant not to assign without license runs with the land.

In an action against an assignee by license for breach of such a covenant the measure of damages is the loss (if any) to the lessor by the substitution of the liability of the last assignee for that of the defendant in respect of covenants contained in the lease.

[16 W. R., June 26, 1868.]

This was an action tried before Mellor, J., at the Manchester Spring Assizes, 1867, when a verdict was found by consent for the plaintiff, subject to a special case for the opinion of the Court.

The action was brought by the plaintiff as lessor against the defendant as assignee of the lease hereinafter mentioned, to recover damages for the breaches of covenants sustained therein.

The declaration set out the deed made between the plaintiff, Edward Morgan Williams, as mortgagee, of the first part, James Kirkman, as mortgagor, of the second part, and Harriet Carmont, William Carmont, and William Corbett, the lessees, of the third part, being a demise for fourteen years of the Clayton Forge, with the machinery, &c. By the lease the lessees covenanted with both the mortgagee and the mortgagor separately The first count of the declaration set out various breaches of covenants, which it is unnecessary to consider; the second was on a covenant that the lessees, their executors, administrators, or assigns, or any of them, would not assign over, underlease, or underlet, or otherwise part with the possession of the demised premises, or any part thereof, or of the lease, without first obtaining the consent in writing of the mortgagee (the plaintiff), his heirs or assigns, or of James Kirkman (the mortgagor), his heirs or assigns, and then only for such time, and subject and in such manner and under and subject to such restrictions as should be expressed in such consent. To this second count the defendant pleaded a denial of the estate of the lessees vesting in the defendant, and of the breach, and demurred on the ground that the covenant of the lessees not to assign without license did not bind the defendant as assignee.

The plaintiff and the mortgagor, James Kirkman signed a license to the lessee to assign, and the lessee accordingly assigned to the defendant, who took possession of the premises, but did not execute the assignment.

The mortgagor, James Kirkman, was suffered to remain in receipt of the rent of the premises, and the plaintiff never interfered in the management or dealing with the property, or disposal of the premises, except by executing the license, and the action was brought in his name on an indemnity being given by James Kirkman. The defendant assigned the premises without the license or consent of the plaintiff or the mortgagor, which was the breach of covenant alleged under the second count.

The questions for the Court were whether the plaintiff was entitled to recover, and if so, on what principle damages should be assessed.

Halker, Q.C., for the plaintiff.—The question is whether since 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, a covenant not to assign without license runs with the land. The covenant comes within the first and second resolutions in Spencer's case; it does not show a mere mode of occupation, but touches or relates to the land. He referred to *Paul* v. *Nurse*, 8 B. & C. 146, and *Hooper* v. *Clarke*, 15 W. R. 347, 8 B. & S. 150.

Jones, Q.C. (*Herschell* with him), for the defendants.—The breach of covenant here is the destruction of the relation of lessor and lessee, and relates to the nature, quality, value, or mode of occupation. He referred to *Doe d. Cheer* v. *Smith*, 5 Taunt. 795; *Bally* v. *Wells*, 3 Wils. 25.

Holker in reply.

Blackburn, J.—The rule has been established since Spencer's case, that where covenants are contained in a lease which in express terms are on behalf of the lessee and his assigns, for things to be done by him and his assigns, which relate to and touch and concern the thing demised, though the original covenant is made with the tenant, still there is such a privity of contract between the landlord and the assignee that the former may sue for a breach of the covenant by the latter. In this case the tenant for himself and his assigns covenants not to assign without license, and the assignee having assigned without license, the question is whether this covenant runs with the land. I cannot see any reason why this should not be a covenant which relates, or touches, or concerns the land. It is for the benefit of the landlord, so that there shall not be a substitution for the person approved of by the landlord or some other person who may be unable to fulfil the covenants of the lease. This touches the land quite as much as a covenant for renewal of the lease: *Roe* v. *Hayley*, 12 East, 464; *Simpson* v. *Clayton*, 4 Bing. N. C. 758; or a covenant to reside on the premises: *Tatem* v. *Chaplin*, 2 Hy. Bl. 133; or a covenant by a lessee of tithes for himself and his assigns not to let any of the farmers in the parish have any of the tithes: *Bally* v *Wells*, 3 Wils. 25; *Brewer* v. *Hill*, 2 Anstr. 413; which is very nearly akin to an agreement not to assign them over. The Court, in *Bally* v. *Wells*, say that a covenant not to assign generally must be personal and collateral, and can only bind the lessee himself, which refers to the case when the lessee only covenants for himself, and the covenant is gone and over when the first assignee comes into possession. On principle, therefore, I think that a covenant not to assign without license runs with the land. Still the assignment, although without license, is operative at

law, and the estate has passed from the defendant to his assignee, and any breach since that has happened is not a matter of covenant for which the defendant is liable; the plaintiff can, however, recover indirectly on the second count, on the principle that if the covenant had not broken by the defendant he would have remained liable, and that by the assignment the lessor may have an inferior recourse against a person insolvent or less able to perform the covenants. In determining the damages the arbitrator will have to see in how much worse a position the plaintiff is than he would have been had he retained the liability of the defendant instead of the substituted liability.

[The remainder of the judgment related to the breaches in the first count of the declaration.]

Lush. J. concurred.

Judgment for plaintiff.

DIGEST.

NOTES OF CASES

FROM UNITED STATES REPORTS.

Agent—Attorney and Client—Equity Practice.

1. An attorney at law having no power *virtute officii* to purchase for his client at judicial sale land sold under a mortgage held by the client, the burden of proving that he had other authority rests on him.—*Savery* v. *Sypher*, 6 Wallace, 157, Pitts. L. J., May 25, 1868.

2. On an application to a court in equity to refuse confirmation of a master's sale and to order a resale—a case where speedy relief may be necessary—the court may properly hear the application, and act on *ex parte* affidavits on both sides, and without waiting to have testimony taken with cross-examination.—*Ib.*

Agent—Insurance—Ratification.

Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium-note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus: "The insurance on this application to take effect when approved by E.P.D., general agent," &c., does not make the previous transaction a nullity until approved: *Ins. Co.* v. *Webster*, 6 Wall.—7 Am. Law Reg. N. S. 571.

Hence though the general agent sent back the application, directing the agent who had delivered the policy to return to the party insured his premium-note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor cancelled the policy.

Collision—River Navigation—Damage.

1. Where the usage in navigating a river is, that both ascending and descending vessels shall keep to the right of the centre of the channel—which is the usage in the river Hudson—the omission to comply, seasonably, with that regulation, if the omission contributes to the collision, is a fault for which the offending vessel and her owners must be responsible.—*The Vanderbilt*, 6 Wallace, 225, Pitts. L. J., May 25, 1868.

2. Compliance with such a usage is required in all cases where the course of a vessel is such that, if continued, there would be danger of collision with other vessels navigating in the opposite direction—*Ib.*

3. Unless precautions are seasonable they constitute no defence against a charge of collision, although they may be in form such as the rules of navigation require.—*Ib.*

4. Objections to the amount of damages, as reported by a commissioner and awarded by the admiralty court, will not be entertained in this court in a case of collision where it appears that neither party excepted to the report of the commissioner.—*Ib.*

Criminal Law.

A criminal sentenced to pay a fine must have been in actual confinement three months before he can be discharged. — *Commonwealth* v. *Superintendent of County Prison*, Phil. Leg. Int. 1868.

Deed—Construction.

Where the purpose of the grant is clearly ascertained from the premises of the deed, this will prevail in the construction, and repugnant words will be rejected though they stand first in the grant: *Flagg, Administrator of Tyler* v. *Eames*, 40 Vt.

And where the premises contain proper words of limitation, and the *habendum* is repugnant to the grant, the *habendum* yields to the manifest intent and terms of the grant: *Ib.*

A deed conveyed in its granting part to the plaintiff's intestate "and her heirs and assigns for ever, a certain piece or parcel of land situated, lying, and being in Halifax, and is the same on which I" (the grantor) "now live; that is to say, one undivided half of the same, with the buildings thereon, with the privileges and appurtenances thereto belonging, bounded," &c. (describing the boundaries); "always

provided that, in the event of her decease, the same shall revert to me if living, if not, to my heirs—being the same farm which I purchased of Darius Plumb;"—*habendum* to the plaintiff's intestate "and her heirs and assigns, to her and their own proper use, benefit, and behoof for ever," with the usual covenants of seisin, warranty, and against incumbrances, and the following clause thereto annexed, viz.:—"Always reserving the reversion to myself and heirs as stipuluated in the deed."

Held, that the plain intent of the deed was to convey an estate for life, and not an estate in fee, and that the deed must have effect according to its intent: *Ib.*

Delivery.

Where the grantor in a deed hands the same to another with instructions to deliver it, as his agent, presently to the grantee, the delivery not depending on any condition, as between the parties to the deed, the title passes at the time of the delivery to the agent: *Ernst* v. *Reed*, 49 Barb.

Insurance—Agency—Rectification.

Where the agent of an insurance company was fully authorized to make insurance of vessels, and had, in fact, on a previous occasion, insured the same vessel for the same applicant, and in the instance under consideration actually delivered to him, on receipt of the premium note, a policy duly executed by the officers of the company, filled up and countersigned by himself under his general authority, and having every element of a perfect and valid contract, the fact that after the execution and delivery of the policy the party insured signed a memorandum thus; "The insurance on this application to take effect when approved by E. P. D., general agent," &c., does not make the previous transaction a nullity until approved.

Hence, though the general agent sent back the application, directing the agent who had delivered the policy, to return to the party insured his premium note, and cancel the policy, the party insured was held entitled to recover for a loss, the agent having neither returned the note nor canceled the policy.—*Insurance Co.* v. *Webster*, 6 Wallace, Pitts. L. J., May 25, 1868.

Lunacy.

1. A person cannot be confined upon the allegation of lunacy, unless there is danger to him, to others, or to his estate, or there has been a legal finding of lunacy.

2. A finding in lunacy without notice is a nullity. — *Commonwealth* v. *Kirkbridge*, Phil. Leg. Int., June 12, 1868.

Mandamus to State Courts—Federal and State Jurisdiction.

After a return unsatisfied of an execution on a judgment in the Circuit Court against a county for interest on railroad bonds, issued under a State statute in force prior to the issue of the bonds, and which made the levy of a tax to pay such interest obligatory on the county, a mandamus from the Circuit Court will lie against the county officers to levy a tax, even although prior to the application for the mandamus a State court have perpetually enjoined the same officers against making such levy; the mandamus, when so issued, being regarded as a writ necessary to the jurisdiction of the Circuit Court which had previously attached, and to enforce its judgment; and the State Court therefore not being regarded as in prior possession of the case.—*Riggs* v. *Johnson County*, 6 Wallace 166, Pitts. L. J., May 25, 1868.

Married Woman.

The Illinois Statute of 1861 giving a married woman exclusive control of her property, declaring that the same shall "be held, owned, possessed, and enjoyed by her, the same as though she was sole and unmarried," and exempting it from execution or attachment for the debts of her husband, does not give to her the power of conveying her real estate without the consent of her husband manifested by joining in the deed.

Although the effect of the statute is substantially to abolish the life estate of the husband in his wife's lands, during their joint lives, accruing to him by virtue of the martial relation, and also to abolish, during the life of his wife, his tenancy by the courtesy in her lands, in all cases where the title has been acquired by her since the passage of the statute, it does not abolish the tenancy by the courtesy after the wife's death, but leaves it unimpaired in the husband.—*Cole* v. *Van Riper.*

Misrepresentation—Money had and received.

W. and S., who had purchased land for $14,000, induced other persons to take stock in an oil company, by untruly representing in the newspapers that the land had cost $81,000. They received the money from subscribers as officers of the company, and it was paid to them individually as consideration money. *Held*, that the stockholders might recover, in an action against W. and S. for money had and received, the difference between the actual and represented cost of the land.—*The Vulcan Oil Co.* v. *Simons & Weeks*, Phil. Leg. Int., May 15, 1868.

Notes of United States Reports.

Mortgage—Forfeiture.

1. Where it is stipulated in a mortgage that in case of a default in the payment of the interest, the principal shall immediately become due and payable, and that the mortgagee may immediately proceed on the mortgage, such a stipulation is an essential part of the contract entered into between the parties, and will be enforced.

2. Such a stipulation is not in the nature of a forfeiture or penalty against which equity will relieve.—*Gulden* v. *O'Byrne*, Phil. Leg. Int., July 3, 1868.

A sale under a writ of partition is a judicial sale, and discharges the lien of judgments and of a mortgage by one of the tenants in common of his undivided portion.

Such mortgage is discharge in Pennsylvania although it be a first mortgage and have priority of all other liens. The Acts of 1830 and 1845 only preserve the lien of such mortgage from discharge by sale under a *writ of execution.*

What irregularities in the proceeding for partition will not vitiate it.—*Farmers and Mechanics' National Bank* v. *Girard Insurance and Trust Co.*

Negligence.

1. A father's negligence is a defence to an action by the father for injuries to his child.

Permitting a child four years old to run at large in a city, is evidence of gross negligence.—*Railway Co.* v. *Glapey*, Phil. Leg. Int., June 5, 1868.

See Railway Company.

Profits of Office on Quo Warranto—Measure of Damages.

1. Where an intruder, ousted by judgment on *quo warranto* from an office having a fixed salary, and of personal confidence as distinguished from one ministerial purely, takes a writ of error, giving a bond to prosecute the same with effect and to answer all costs and damages, if he shall fail to make his plea good, thus, by the force of a supersedeas, remaining in office and enjoying its salaries, does not prosecute his writ with effect, and is, after his failure to do so, sued on his bond by the party who had the judgment of ouster in his favor, the measure of damages is the salary received by the intruding party during the pendency of the writ of error, and consequent operation of the supersedeas.—*United States* v. *Addison*, 6 Wallace 291.

2. The rule which measures damages upon a breach of contract for wages or for freight, or for the lease of buildings, where the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and where the damages which he is entitled to recover is the difference between the amount stipulated and the amount actually received or paid, has no application to public offices of personal trust and confidence, the duties of which are not purely ministerial or electoral.—*Ib.*

Railway Company.—Negligence.

1. In an action against a railroad company for injury caused by an accident, evidence that the conductor was intemperate or otherwise incompetent is admissible to raise a presumption of negligence.

Admissions or declarations of the company, made subsequently to the accident, are not competent as part of the *res gestæ.*

The declarations of an officer of the company stand upon the same footing.

In an action for damages by a person injured by negligence, evidence of the number of plaintiff's family or of his habits and industry is not admissible unless special damage is averred.

It is no justification for the employment of an incompetent servant that competent ones were difficult to obtain.

Where a person injured by a railroad accident had accepted a ticket or pass describing him as "route agent, an employee of the Railroad Co.," this pass is competent evidence for the company, but it does not estop the plaintiff from showing that he was not, in fact, an employee of the company.

In an action for injury by negligence the damages should be compensation for the actual injury, and it is error to leave the measure and amount of damages, as well as the rules by which they are to be estimated, entirely to the jury.—*The Pennsylvania Railroad Co.* v. *Books* Am. L. Reg., 524.

2. A person receiving a printed notice on his ticket or check at the time of delivering his goods to a carrier is to be charged with actual knowledge of the contents of the printed notice.

Where such a notice stated that the carrire would not be responsible "for merchandise or jewelry contained in baggage, received upon baggage checks, nor for loss by fire, *nor for an amount exceeding* $100 *upon any article*, unless specially agreed for," &c., the words "any article" mean any *separate* article, not a trunk with its contents. The language bears that construction, and must be taken strictly against the carrier.

Therefore, a traveller who gave a single trunk to a carrier and received such a notice, was allowed to recover the value of separate articles in the trunk amounting to $709.

Baggage includes such articles as are usually carried by travellers. Books and even manuscripts may be baggage, according to the circumstances and the business of the traveller.

In this case a student going to college was allowed to recover the value of manuscripts which were necessary to the prosecution of his studies.—*Hopkins* v. *Westcott et al.*, 7 Am. Law Reg. N. S. 534.

It is negligence for a passenger in a railroad car to allow his arm to project out of the window, and if he receive injury from such position he cannot recover.

The railroad company is not bound to put bars across its windows to prevent passengers from putting their limbs out.—*Indianapolis and Cincinnati Railroad Co.* v. *Rutherford.*

Sale of Goods—Delivery.

1. Where goods are sold for cash, and the vendor delivers them to the vendee upon the faith of his paying cash for them, and immediately demands the cash, and the vendee refuses to pay it, such a delivery is not an absolute but a conditional delivery; and if the vendee refuses to perform the condition, no property in the goods passes to him.

2. Where goods are sold for cash, and they are delivered to a carrier to be transported to the vendee, and the vendor retains the bills of lading, and immediately draws upon the vendee for the price of the goods, and the bills of lading are tendered to the vendee when payment of the draft is demanded, which is refused, whereupon the bills of lading are retained by the vendor, who immediately attempts to reclaim the goods, these facts are evidence to go to the jury to show that the delivery was a conditional and not an absolute delivery. Opinion by Thayer, J.—*Refining and Storage Co.* v. *Miller*, Phil. Leg. Int., July 17, 1868.

Specific Performance—Equity.

The enforcement of a contract in equity is entirely in the discretion of the court, untrammelled by rule or precedent. *Per* Sherwood, J. —*Oil Creek Railroad Co.* v. *Atlantic and Great Western Railroad Co.*, Phil. Leg. Int., May 29, 1868.

Tax Sales—Inadequacy of price—Suppression of Competition—Equity.

1. Where land is sold for taxes the inadequacy of the price given is not a valid objection to the sale.—*Slater* v. *Maxwell*, 6 Wallace 268.

2. Where a tract of land sold for taxes consists of several distinct parcels, the sale of the entire tract in one body does not vitiate the proceedings if bids could not have been obtained upon an offer of a part of the property.—*Ib.*

3. Where a fact alleged in a bill in chancery is one within the defendant's own knowledge, the general rule of equity pleading is that the defendant must answer positively and not merely to his remembrance or belief.

Accordingly, when the bill alleged that, at the time that a very large tract of land, sold for taxes, was put up for public sale, a great many persons were present with a view to purchase small tracts for farming purposes, but that the defendant stated that the complainant would redeem his land from the purchasers, and in that way put down all competition, and had the entire property struck off to him for the amount of the taxes; and that this conduct was pursued to enable him to buy without competition, for a trifling amount, all the land of the complainant. *Held*, that an answer was evasive and insufficient when answering that the defendant has "no recollection of making said statement, nor does he believe that he stated that W. S. would redeem his land," and "that he believes the charge that he stated to the bystanders attending that sale that he would do so, to be untrue."—*Ib.*

4. It is essential to the validity of tax sales that they be conducted in conformity with the requirements of the law; and with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be strictly exacted.—*Ib.*

5. When the objections to a tax deed consist in the want of conformity to the requirements of the statute in the proceedings at the sale, or preliminary to it, or in the assessment of the tax, or in any like particulars, they may be urged at law in an action or ejectment. Where, however, the sale is not open to objections of this nature, but is impeached for fraud or unfair practices of officer or purchaser, to the prejudice of the owner, a court of equity is the proper tribunal to afford relief.—*Ib.*

NOTES OF QUEBEC CASES.

Court Martial—Volunteer.

Held, that a volunteer is liable by 29, 30 Vic. cap. 12, to be tried by a Court Martial for misconduct while present at a parade of his corps, though not actually serving in the ranks at the time.—*Ex parte Rickaby*, 17 L. C. R. 270.

Deed—Delivery.

Held, that the constructive delivery contained in the following words, "said timber to be delivered at Ottawa, where the same shall be

manufactured, and to be considered as delivered, when the same is sawed and then to belong to, and to be the property of the parties of the second part," is not valid as regards a third party, without notice and actual delivery.—*White* v. *Bank of Montreal*, 12 L. C. Jurist, 188.

Franchise—Usurpation.

1. The petioner complained that the defendants exercised the occupation of carters in and within the limits of the City of Montreal, and carried and transported for hire, goods and merchandises from their depot, to and from the stores and residences of the citizens of the City of Montreal, and that they exercised an undue advantage, privilege and monopoly, injurious to the carters of Montreal, and to the citizens thereof, and the petition prayed for an injunction against the defendants.

Held:—1st. That it was not proved that the carters had suffered or had been directly aggrieved to an extent, or from such illegal courses directly affecting them, as would justify the issuing of an injunction in the present case.

2nd. That the facts of collecting and delivering by carters exclusively employed to that effect by the defendants, was not injurious, but on the contrary advantageous to the public.

3rd. That the defendants had a right as common carriers, and in prosecution of their lawful business as such to employ exclusively any carter or carters they might in their discretion select to collect from and deliver freight to their customers; and that such exclusive employment of particular carters is not a violation of their charter, inasmuch as the act itself was essential or incidental to their business as common carriers.

4th. That no injunction in law could issue to restrain the defendants from illegal acts, by and from which the petitioners were not shown to be directly aggrieved, and which were not at the same time proved to be injurious to the public.

5th. That none of the individuals or parties using the defendants' road, and paying their charges for cartage has complained in the present case, and for all these reasons the petition must be refused.—*Attorney General* v. *Grand Trunk Railway Co.*, 12 L. C. Jurist, 149.

2. *Held*, Inasmuch as the corporation impleaded was the corporation erected under the Provincial Act, known as "The Grand Trunk Railway Act of 1854," and inasmuch as the corporation complained of, and alleged to have been formed under the Provincial Act, instituted "An Act to incorporate the Grand Trunk Railway Company of Canada" has no existence, therefore the petition and writ in this cause were irregular and illegal, and not within the requirements of the Consolidated Statutes of Lower Canada, cap. 88.—*Ib.* 177.

Promissory Note—Usury.

Held, that a promissory note for $1,000 given on February 15, 1864, as a renewal of one dated 23rd May, 1862, which had been discounted by plaintiff in American greenbacks taken at par at the ordinary rate of seven per cent., and the payment in addition of a commission of $10 to cover alleged trouble connected with renewals, is null and void, as being tainted with usury.—*The Eastern Townships Bank* v. *Humphrey et al.*, 12 L. C. Jurist, 187.

GENERAL CORRESPONDENCE.

The Statute of Limitation as applied to Division Court Process.

To the Editors of the Canada Law Journal.

Messrs Editors,—You would oblige me and many of your readers by giving your opinion on a question relating to the application of the Statute of Limitations to Division Court suits under certain circumstances. The question is one that has arisen recently in Recorder Duggan's Court in Toronto and has doubtless arisen in many other Courts. It is this:—"A has a claim against B, due in 1861. He sues it in 1862, but the summons is not served. He takes out another summons in 1863 and tries to serve it, but cannot do so. B leaves Canada in 1863, and goes to the United States—but returns in 1867. A then goes to the clerk and continues his efforts to serve him, taking out another summons, in the same suit, and gets B served for trial in 1867. Now you will perceive that there is a hiatus or gap of say four years, when A did nothing in the suit because B was in foreign parts. It would have been useless for him to have done so until B's return."

The question is can A avail himself of his summonses issued in 1862 and in 1863 to stop—or to defeat a plea of the Statute of Limitations, pleaded in 1867, by B to A's claim? In Toronto the Division Courts are held twenty-four times in the year, and in other places they are held, sometimes monthly sometimes every two months. Again is there any reason why the old doctrine of continuances, that is, a constant issue of process, the one linked into

the other down to the last summons issued, and reaching back to the first summons issued before the claim was barred by the Statute, should be applied to Division Court suits? My opinion is that it should not. Suppose summonses were issued in this way in Toronto from Court to Court, for four years on a claim of $100. We would have ninety-six summonses issued to connect that of 1863 with that of 1867: or, if the Court were held six times in a year we would have 24 summonses. In the first case the costs could not be less than $200—in the last over $50. My idea is that if the plaintiff makes use of reasonable efforts to serve the defendant—sues him—enters his suit, but fails to serve him—that is a commencement of the suit, which if pursued within six years ought to stop the effect of the Statute.

The old doctrine of continuances applied to Courts of Record I think does not apply to Court not of Record.

Then, process issued from term to term—now it issues every six months. Continuances are abolished in Canada in Courts of Record, but the summons should no doubt in Courts of Record be issued and reissued or continued regularly every six months. I cannot see any necessity for this in Division Courts, where the action is once honestly commenced, and not abandoned, but only left in abeyance because the defendant has left the country, provided it is acted on within six years. What is your opinion Messrs. Editors?

The late Judge Harrison, I know, acted on the view I have taken.

"Scarboro."

Toronto, 12th Sept. 1868.

A Master's Right to order a Servant to go to Bed.—A singular case came before the County Court judge at Guildford (Mr. Stonor.) *Wheatly* v. *White*, was a claim of 16*s.* 8*d.* in lieu of notice. The defendant is the landlord of the Talbot Inn at Ripely. The plaintiff said she was in the service of the defendant, who had dismissed her without giving her any notice. The cause of her dismissal was that the defendant came down into the kitchen one night and told her to go to bed at a quarter to 10 o'clock. She refused to do so, as they never went to bed till half-past 10. On the following morning he threatened to kick her out of the house if she did not go. The Judge.—I think your master was quite justified in dismissing you. When your master told you to go to bed it was your duty to do so, and as you did not obey his reasonable commands, he was quite justified in dismissing you. I shall find a verdict for defendant.—*Law Times.*

Bishop Burnet tells of Hale: "Another remarkable instance of his justice and goodness was, that when he found ill money had been put into his hands, he would never suffer it to be vented again; for he thought it was no excuse for him to put false money in other people's hands, because some one had put it into his. A great heap of this he had gathered together, for many had so abused his goodness as to mix base money among the fees that were given him." In this particular case, the judge's virtue was its own reward. His house being entered by burglars, this accumulation of bad money attracted the notice of the robbers, who selected it from a variety of goods and chattels, and carried it off under the impression that it was the lawyer's hoarded treasure.—*Jeaffreson.*

Wigs and Coats.—The heat in Court at Lewes assizes was productive, last week, of peculiar results. Baron Martin drove up to the Shire Hall without a wig, and sat all day on the bench with head uncovered. Several barristers imitated His Lordship's example, but no counsel addressed the Court or jury in that irregular habit. The jury were evidently infected by the contagion, for three or four of those gentlemen took off their coats, and considered their verdicts in their shirt sleeves. Mr. Serjeant Gaselee thinks that a man has a right to be hanged in public. On the same principle, we suppose, a criminal ought not to be sent into penal servitude by a wigless judge and a coatless jury. On Wednesday the Judge-Ordinary intimated that the barristers in his Court might dispense with their wigs, and set them the example. We do not know whether Sir. J. Wilde was aware of the precedent at Lewes, but it is to be hoped that no opportunity has been afforded for the intervention of the Queen's Proctor.—*Law Journal*

A Welsh Jury.—At the Montgomery Quarter Sessions, held at Newtown, last week, before Mr. C. W. Wynne, M.P., and a bench of magistrates, a tailor, named John Welsh, was placed in the dock, charged with stealing a milk-can, the property of David Davies, residing at Meifod. The prisoner was undefended, and the jury, after hearing the evidence, handed in a verdict of guilty, and Welsh was sentenced to three months' imprisonment, with hard labour. According to the local *Express* it has since transpired that, so far from finding the prisoner guilty, the jury were unanimous in the belief that he was innocent, and the foreman was charged with the delivery of a verdict accordingly, but that when he stood up to reply to the formal question of the clerk of the court the unfortunate man lost his presence of mind and delivered a verdict of "Guilty," and the prisoner was consigned to gaol in the presence of the jury, who were too frightened to interfere.—*Times.*

The *Times* cites the following from an Irish paper, the *Skibbereen Eagle*:—As Merry as Cricketers.—The first day of the Session at Bantry, judges, counsellors, lawyers, jurors, clients, and process-servers, for want of business, went cricketing."

THE

Canada Law Journal.

OCTOBER, 1868.

THE PRESIDENT OF COURT OF APPEAL.

We make space at the last moment of going to press, to state, that Hon. W. H. Draper, C.B., having resigned his seat, as Chief Justice of Upper Canada, has been gazetted President of the Court of Error and Appeal.

It is understood that the Chief Justice of the Common Pleas takes his place.

CONSOLIDATED GENERAL ORDERS OF THE COURT OF CHANCERY.

Now that a sufficient time has elapsed since the promulgation of these orders, and the tariff of fees and charges, to enable practitioners to judge of the merits of the work by the test of practical experience of their efficiency, it may not be amiss briefly to enquire how far a work of this kind was necessary, and how far the end it was designed to accomplish has been attained.

Of its necessity, no practitioner who has had any experience of the state of things just previous to the issuing of these consolidated orders can entertain a reasonable doubt. Since the last partial consolidation in 1853, many alterations and additions had been made by subsequent orders, promulgated as the necessities of the business of the Court required. The large and steady increase of business in the Court, the progress of more enlightened views respecting procedure, the determination of the judges to expedite the final disposal of causes, and take away the reproach of unnecessary delays to suitors, which, whether well or ill founded, was constantly directed against the Court, and the action of the Legislature in from time to time conferring new jurisdiction—all these circumstances combined (or appeared to do so) to render necessary the repeated issue of fresh orders; and certainly cannot be said that any such necessity ever passed unheeded, for the fertility of resource and untiring energy of the learned judges of the Court seemed equal to any emergency in providing for the settlement of "new points." The occasion for further directions in matters of practice and procedure appeared to be so constantly arising, that the practitioner at length came to expect a new "batch" every month, with nearly the same certainty as he might expect his number of the *Law Journal*. Not only were wholly new orders promulgated—as under the "Act for quieting Titles"—but many old ones were abrogated in whole or in part, emendations and alterations were made in others, while some, though neither abrogated nor altered, had become practically obsolete.

Such a condition of things could not but prove more or less perplexing to all. Judges, practitioners and suitors alike were reduced to a state of rather bewildering uncertainty as to what were and what were not existing orders. For remedy a revision and consolidation was proposed, and has been carried into effect. The chief part of the work was, we believe, entrusted to the Judges' Secretary, whose well-known ability, practical experience and industry well fitted him for the task; but the whole work was, we understand, from time to time submitted to, and received a careful supervision from the Judges before it was given to the professional public.

It was to be expected, of course, that in a work of some considerable magnitude, where a great deal of old matter had to be got rid of, and a good deal of new introduced, without at the same time trenching any more than was absolutely necessary upon long established rules of practice, or unsettling well-considered decisions, some errors would creep in. A few "declaratory orders," as they are termed by the Judges, have been issued, for the purpose of setting right those errors which have been discovered; and a reference to them (printed in another place) will show how comparatively trifling were the errors to be rectified.

Taken as a whole, the work has been done in a thorough and satisfactory manner. One great point gained, and one on which practitioners ought to congratulate themselves, is that for some time to come (but for how long it is hard to say) they may feel pretty confident that all the existing orders of the Court, except the declaratory orders above mentioned, are to be found between the covers of this work, by which, to use the words of the first order, "from and after the first day of July, 1868, all the general orders of this Court which have been at any time heretofore made," are abrogated. But while thus uprooting all pre-

existing orders, the judges have taken care that they shall not be understood as intending to unsettle or disturb the rules of practice unnecessarily, and accordingly we find the second order providing that the abrogation before spoken of "shall not affect any practice of the Court * * * which originated in or was sanctioned by any of the orders hereby abrogated, except so far as the same may be inconsistent with anything hereinafter contained."

A number of useful and sensible changes have been made; much circumlocution has been got rid of; the length and consequent expense of some proceedings has been reduced, and a more simple plan of procedure in several cases adopted. Thus we find the old, unnecessary and practically inconvenient system of transmitting answers for filing, done away with; one short form of jurat substituted for the various prolix forms which had to be adopted when an answer or affidavit was sworn to; præcipe decrees in mortgage cases, which were seven folios in length, now scarcely extend to three; and the issuing of them in certain cases is entrusted to the Deputy Registrars, and final orders for sale or foreclosure are reduced to a minimum of verbiage. Formerly an order for committal for contempt for non-production of documents in the office of the Registrar or of a Deputy Registrar, could not be obtained except on personal service of the notice of motion: it is now sufficient, in case of non-production in the office of the Clerk of Records and Writs, to serve the solicitor of the defaulting party, if he has one, with the notice to commit; but it is questionable whether, in case of non-production in the office of a Deputy Registrar, personal service of the notice to commit is not still necessary. In addition to the remedy by committal for non-production, a plaintiff may now move to take the bill *pro confesso* against the defaulting defendant, and a defendant may move to dismiss the bill of a plaintiff who has neglected to produce. The business of the various Court days has been regulated in a different manner, and a new mode of signing, entering and issuing orders made in Chambers instituted. An office new in our Court of Chancery—that of Clerk of Records and Writs—has been created, and a new procedure in alimony suits introduced.

Nor has the important matter of fees escaped attention. The sheriffs have been liberally provided for by giving to them the service of all papers requiring personal service on parties within the jurisdiction, and providing that their mileage fees shall be paid before they can be allowed on taxation, as has long been the practice at common law. In a few instances an allowance has been made to solicitors for work which it was well understood they were constantly obliged to do, but for which the tariff did not warrant any change; but for the greater part, solicitors' fees have been left as they were.

We have thus briefly indicated a few of the changes introduced, though more remain to be noticed, did our space permit. In conclusion we think we may fairly say that the labours of the Judges and of their Secretary have proved a great boon to practitioners, and one which they must thoroughly appreciate. Neither the Judges nor the Secretary can be said to have too much spare time on their hands, and the undertaking and accomplishment of the work of consolidation and revision, in addition to their other duties, must have been no light task. The generally satisfactory manner in which the Consolidated Orders have so far worked in practice, proves how thoroughly the task has been executed; and if we might be permitted to offer an humble suggestion, it would be, that time should now be given to allow something of a settled practice to grow up under the orders *as they stand*, to be moulded by the care, experience and intelligence of those who have accomplished so good a work.

LEGISLATION.

Some remarks which lately fell from a learned Judge—no mean authority in such matters, and himself a careful, far-seeing lawmaker—are somewhat appropriate, in connection with the approaching session of the local Parliament. In remarking upon the confusion arising from the frequent passing of amending acts, and the difficulty in construing their often discordant provisions, he contrasted the difference between the mode of effecting legal reforms in England and in this country. There, the general practice was to give the law as it stood a fair trial, of sufficient length to ascertain its defects, and then to pass an act which should in itself remedy those defects.

But in this country there was an undue haste, to alter something in the existing law, which might appear at first to be defective, without waiting to see whether the actual working of the law might not show that this apparent defect was unavoidable, or in what way it could best be remedied; and without a sufficient consideration of other enactments touching the case. This amended act would be then again amended, and then another bit of the original act, and so make confusion worse confounded, and raise a dozen difficult questions for one before; until, at length, it would become absolutely necessary to consolidate all those conflicting provisions, with divers explanatory clauses perhaps added, then there would be another series of explanatory acts, and so on. The danger of this sort of legislation is increased where there is only one legislative body, as in this Province; one great safeguard of hasty legislation having been removed.

There is another matter in connection with this subject, which it is of importance to keep in view, and we have already spoken of it with reference to proposed changes in the law of Division Courts.

In all matters relating to the administration of justice in England the law officers of the Crown assume the responsibility of measures introduced in the House of Commons, and the bill, if not actually prepared by them, has their approval and sanction, and is submitted under their auspices. So it has been with legislation in Canada, and from the course taken last session by the Premier, and the information he has called for with reference at least, to one subject requiring reform, we doubt not the wholesome rule will be followed in the legislature of Ontario.

It is only those who are familiar with the administration of justice that can estimate the evils which spring from crude or party legislation, particularly in reference to the inferior courts—how extremely difficult it is in these courts, and by people that are not lawyers, to become accustomed to any change in the laws, or to adapt their business transactions to it. And we are strongly of opinion that the sooner it is understood that legislation on such subjects is to be under the sanction of the Attorney General the better will it be for that portion of the business community.

There is, of course, a natural desire with members of the legislature to have their names connected with statutes for the improvement of the law, but a little reflection will shew that it would be unwise and unsafe to relieve the law officers of the Crown of responsibility on this head. It is a wise rule which requires that legislation on any question of procedure in the Courts of civil jurisdiction, should not be undertaken on the individual responsibility of private members—unless indeed they have lost all confidence in the government for the time being, and have become antagonistic to them.

A new edition of "Harrison's Digest" is in course of publication in England, and will, it is said, be issued from the press early in 1869. Having some experience in such matters, we can scarcely hope that the expectations of the compilers will be fulfilled as to time, but however that may be, the Digest will be a great convenience to the profession, as it will bring down the cases to the present year.

When we are in actual possession of this late English Digest and long promised consolidated digest of Upper Canada cases, we may indeed, for a few years at least, hug ourselves with the supposed possession of the busy practising lawyer's *ignis fatuus* a *multum in parvo*.

DECLARATORY ORDERS OF THE COURT OF CHANCERY.

October 17, 1868.

550. In orders 88 and 120, the word "month" is to be read as lunar month; in order 200, the word "shall" is to be read as permissive; in order 288 the words "with the Registrar" are to be struck out; and in schedules C, D, N and S, the word "Registrar" is to be struck out wherever the same occurs, and the words "Clerk of Records and Writs" inserted in lieu thereof.

551. In accordance with the practice heretofore prevailing in the office of the Registrar, the fee of $2 payable on setting down a cause with the Clerk of Records and Writs, is to be payable only on the setting down of causes for examination and hearing, on motion for a decree, or, on bill and answer; in all the other cases the fee for setting down causes is to be 50c.

The following fees, which, before the naming of a Clerk of Records and Writs, were payable to the Registrar, are now to be payable in the office of the Clerk of Records and Writs:

Every Certificate of Registration.....	$0 50
Enrolling Order	0 50
Drawing Order, per folio.....	0 20
Entering same when necessary, per folio..	0 10
Entering Certificate of Title or Conveyance, per folio	0 10

552. A notice of motion under order 467 is to be served upon all proper parties at least fourteen

days before the day named for hearing the application.

(Signed) P. M. VanKoughnet, *C.*
J. G. Spragge, *V. C.*
O. Mowat, *V. C.*

SELECTIONS.

LORD CHIEF JUSTICE OF ENGLAND AND MR. JUSTICE BLACKBURN.

Few members of the bar who were present in the Court of Queen's Bench on June 8, 1868, are likely speedily to forget the memorable scene which then took place. Those who for thirty years had been accustomed to witness the stream of justice flowing in unruffled calmness through those hallowed precincts, felt for a moment as if the idea of Euripides had been realised, and the fountains were flowing up the sacred rivers. But it soon appeared that it was only a temporary obstruction which had occurred; and after the Chief Justice had vindicated himself and the law of which he is the guardian, and Mr. Justice Blackburn had offered his explanation of his apparently wayward course, it became obvious that "the fountains of justice" were undisturbed, however clearly it had been shown that the streams that are derived from them are liable at times to flow unevenly, as well as to "take tinctures and tastes from the soil through which they run." But the strangeness of the event which then took place calls for some comment from us; and we shall state the views we have formed with reference to it and the circumstances out of which it arose, with all respect for the eminent personages concerned, but without any attempt to conceal our own deliberately-formed opinion. We think there can be little doubt, however much it was to be regretted that any necessity should have arisen for the Chief Justice to repudiate the views stated by Mr. Justice Blackburn in his charge to the grand jury of Middlesex in the case of *Reg.* v. *Eyre*, that the former did no more than his duty in publicly expressing his disapproval of the charge of the senior puisne judge. Every one who read the report of the charge in the newspapers must have seen at once its inconsistency with the views stated in the charge of the Chief Justice in the case of *Reg.* v. *Nelson and Brand;* and when Mr. Justice Blackburn stated twice during the course of his charge that he had the concurrence of the Chief Justice in what he said, it certainly seemed at first that the only inference that could be adopted was that the Chief Justice had materially modified his opinions on a question of great importance. Logical as this inference for a moment appeared to be, we confess that we struggled against it. The views which the Chief Justice had laid down had been so clear, and his conclusions so well grounded, his opinions on martial law had been so consistent with themselves and with the whole of our legal system, and he had spoken with such a full conviction of their truth, that we could scarcely suppose that he had abandoned the strong position which he had formerly occupied. Sober reflection, therefore, has led us to the conclusion, that "Some one had blundered:" and where the blame lay has now become tolerably clear and intelligible.

After comparing what was said in court by the Chief Justice on the occasion referred to, with the explanation then given by Mr. Justice Blackburn, and after reading the letter of the former, and that of Mr. Justice Lush, the facts are obvious enough, and supply sufficient grounds on which a correct judgment may be formed. Before charging the grand jury in *Reg.* v. *Eyre*, Mr. Justice Blackburn had embodied the substance of the law he intended to law down in a paper. The view of the law therein contained, and which was assented to by the other judges of the Court of Queen's Bench, may be considered from the statement of the Chief Justice to have been as follows:—

"There was undoubtedly a proposition of law which seemed to us sufficient for the guidance of a jury, and which we understood was the form, if I may so express myself, the basis of the charge, on which proposition we were all agreed, viz., that assuming the governor of a colony had, by virtue of authority delegated to him by the Crown, or conferred on him by local legislation, the power to put martial law in force, all that could be required of him, so far as affecting his responsibility in a court of criminal law, was that in judging of the necessity which, it is admitted on all hands, affords the sole justification for resorting to martial law—either for putting this exceptional law in force or prolonging its duration—he should not only act with an honest intention to discharge a public duty, bnt should bring to the consideration of the course to be pursued, the careful, conscientious, and considerate judgment which may reasonably be expected from one vested with authority, and which, in our opinion, a governor so circumstanced is bound to exercise before he places the Queen's subjects committed to his government beyond the pale and protection of the law. Having done this he would not be liable for error of judgment, and still less for excess or irregularities committed by subordinates whom he is under the necessity of employing, if committed without his sanction or knowledge. Furthermore, we considered that a governor sworn to execute the laws of a colony, if advised by those competent to advise him that those laws justify him in proclaiming martial law in the sense in which Governor Eyre understood it, cannot be held criminally responsible, if the circumstances called for its exercise, even though it should afterwards turn out that the received opinion as to the law was erroneous. On the other hand, in the absence of such careful and conscientious exercise of judgment, mere honesty of intention would be no excuse for the reckless, precipitate, and inconsiderate exercise of so formidable a power, still less for any abuse of it in regard to the lives and persons of Her Majesty's subjects, or in the ap-

plication of immoderate severity in excess of what the exigency of the occasion imperatively called for. Neither could the continuance of martial law be excused even as regards criminal responsibility when the necessity which can alone justify it had ceased by the entire suppression of all insurrection, either for the purpose of punishing those who were suspected of being concerned in it, or for striking terror into the minds of men for the time to come. This was the substance of what we all concurred in thinking was the proper direction to be given to the jury as to the responsibility of a governor in applying or continuing martial law. This was all that appeared to us necessary to lay down in point of law."—*Daily News, June* 9, 1868.

It appears that Mr. Justice Blackburn had read the paper in which his views were stated to the other judges before the arrival of the Chief Justice in the room in which they assemble before going into court, but on the latter coming into the room Mr. Justice Blackburn made a verbal statement to him of what was embodied in the paper; and Mr. Justice Lush, in the letter already referred to, says that the paper contained only the general propositions mentioned by the Chief Justice in court, "adding that the application of the principles to the particular case required him (Mr. Justice Blackburn) to tell the jury what was the law of Jamaica." We gather that this reference to the law of Jamaica was not mentioned by Mr. Justice Blackburn in his verbal statement to the Chief Justice; but after the broad principles which the former had declared that he was prepared to lay down, it could scarcely be very material what he intended to say to the grand jury with respect to the law of Jamaica. We, therefore, attach no importance to what we assume was an omission in his verbal statement to the Chief Justice. Mr. Justice Lush further says of the paper—"In no other way did it refer to that law, nor did it state anything about martial law, or refer to the case of Gordon."

It is clear from this that the points mentioned by the Chief Justice in the passage we have quoted were the only matters of law stated by Mr. Justice Blackburn to the other judges, and the only matters of law, therefore, in which they expressed their concurrence. Now it may be admitted that Mr. Justice Blackburn in his charge to the grand jury did mention these points, and so far directed them in accordance with the views of the rest of the bench, but unfortunately he mentioned a great many more which he had not brought to the attention of the other judges, and which were directly opposed to the views expressed by the Chief Justice in his charge to the grand jury in the case of *Reg.* v. *Nelson and Brand.* With respect to the legality of martial law as applied to civilians, the meaning of the Jamaica statutes, and the removal of Gordon from Kingston into the proclaimed district, Mr. Justice Blackburn expressed opinions in a clear and decided manner which were not stated by him to the other judges, and which were totally opposed to those of the Chief Justice as laid down in the charge just mentioned. Not only was no account made of the views which the latter had stated with the greatest distinctness and force, but he was actually represented as sanctioning doctrines which ran counter to all that he had laid down with so much care as to show how fully he had considered the matter, and with so much clearness as to prevent the possibility of mistake.

The emphatic disclaimer by the Chief Justice of views which he was represented to have sanctioned, but from which he entirely dissented, was therefore not only perfectly justifiable, but imperatively called for. In a manner the most explicit, and in language the most unequivocal, he entered his protest against the opinions which had been expressed by the senior puisne judge in his charge to the grand jury of Middlesex.

"I differ, in the first place, from the learned judge in the conclusion at which he seems to have arrived that martial law, in the modern acceptation of the term, was ever exercised in this country, at all events with any pretence of legality, against civilians not taken in arms. The instance referred to is of most doubtful character. In the second place, while I never doubted that it was competent for the legislature of Jamaica to confer on the governors the power to put martial law in force, I entertain for the reasons I have stated elsewhere, very grave doubts whether the Jamaica statutes have any reference to martial law except for the purpose of compelling the inhabitants of the island to military service and subjecting them while engaged in it to military law. I abstain from expressing any positive opinion on so debatable a question, but I must, at the same time, say that, in my judgment, there is too much doubt on the subject to warrant a judge, in the absence of argument at the Bar and of judicial decision, to direct a grand jury authoritatively that these statutes warrant the application of martial law; nor does such a direction appear to me to be at all necessary, seeing that we are agreed that a governor, giving effect to those statutes in the sense in which they have been understood in the colony, would not be criminally responsible. But above all, I dissent from the direction of Mr. Justice Blackburn, as reported, in telling the grand jury that the removal of Mr. Gordon from Kingston into the proclaimed district for the purpose of subjecting him to martial law was legally justifiable."—*Daily News, June* 9, 1868.

With respect to the explanation given by Mr. Justice Blackburn, we cannot but consider it as unsatisfactory. It was neither a humble apology for what he had done, nor a vigorous defence of himself. It oscillated between the two, and it conveyed therefore the impression of a man who felt himself to be in the wrong, but who had not the generosity to admit it frankly. We are fully alive to the difficulty of the position in which the learned judge was placed; but a little more

boldness, or a little more candour, would have easily extricated him from the embarrassing circumstances which environed him. As it was, he left the matter very much in the same condition as it was when the Chief Justice finished what he had to say, and he did not succeed in the smallest degree in impugning the statements of the latter, far less in vindicating himself.

After carefully considering the matter, we have no hesitation in arriving at the conclusion that Mr. Justice Blackburn made a great mistake. Knowing as he did the opinions of the Chief Justice, it was his duty to explain to the other judges fully and explicitly the views which he intended to lay down to the grand jury. The statement which he made to the other judges did not contain the whole of what he did lay down in his charge, and in this he acted not merely unwisely, but, as we humbly think, unfairly. It was clearly his duty, after consulting the rest of the court, to adhere rigidly and scrupulously to the views which he had brought to their notice, and to which they had assented as sound and just. Even if he had said nothing in his charge as to the sanction which the other judges of the court gave to his views, this was the obvious and straightforward course which he ought to have adopted; but his error was greatly aggravated by his claiming their sanction for views which had never been brought to their attention, and which he must have perfectly well known were opposed to the express declarations of the Chief Justice.

In his explanation to the court, Mr. Justice Blackburn, after referring to the charge of the Chief Justice, said: "I came to the conclusion (it may be an erroneous one, but one which I still entertain) that there was no point on which it was necessary to give the grand jury a direction on which my opinion as to the law was in conflict in any way with any direction contained in that charge." It has been suggested that Mr. Justice Blackburn may have attached some technical meaning to "a direction," and that he did not consider the other parts of his charge touching on legal matters as coming under that category. We acquit the learned judge of quibbling of this sort. Neither do we for a moment suppose that he so totally misapprehended the scope of what the Chief Justice had said, as these words would seem to imply. The declaration seems to us only one of those unmeaning things which a man says when he finds himself in a disagreeable position and must say something, but has not the good feeling to say the right thing.

But the statement of the Chief Justice on one point makes the error of Mr. Justice Blackburn still more serious. It appears that almost on the eve of the delivery of the charge, the opinion of the latter was that the apprehension and removal of Gordon were in point of law unjustifiable. The Chief Justice says: "It certainly was so understood by other members of the court, and I believe I am warranted in saying, that the statement of the learned judge to the grand jury on this head took the other members of the court as much by surprise as it certainly did me." Mr. Justice Blackburn made no attempt to explain his extraordinary change of opinion on this vital matter, and we believe for the very simple reason that it was impossible for him to do so. The feeling of the learned judge seemed to be a dogged determination to brave the whole thing out without explaining. In the circumstances in which he was placed a man of a sensitive mind would have called on the mountains to cover him, or would have turned resolutely on the Chief Justice and fought *à l'outrance*. But Mr. Justice Blackburn did neither, and therefore excited little sympathy on the part of the crowded Bar, who witnessed the strange and painful scene.

We do not ascribe to Mr. Justice Blackburn any unworthy motive for what he did, or for what he failed to do. His whole conduct in this matter has the appearance of a freak—of an *escapade*—of a temporary aberration. The actions of men are in general governed by certain motives, and when these motives are very recondite, it requires a large amount of sagacity to discover their exact nature and operation. But cases occasionally arise which are entirely abnormal, and where things are done which are utterly inexplicable on any of the ordinary principles which regulate human actions. We are inclined to rank the conduct of the learned judge under this class of cases, rather than to ascribe it to any of the causes which have been suggested, and which we think it quite unnecessary to mention. Mr. Justice Blackburn is no doubt an excellent lawyer and an able judge, but he possesses perhaps too much of the *perfervidum ingenium* of his countrymen, and there are times when, even with the wisest of our northern friends, this quality escapes for a short season from the prudence which in general directs its action. We do not think that anything more can be said with respect to the case now before us, and we are happy to believe that this is really the sum of the whole matter. The thing was an untoward accident, and the sooner it is forgotten the better.

We have formed our opinion of the conduct of Mr. Justice Blackburn quite irrespective of the consideration whether the law he laid down, in opposition that contained in the charge of the Chief Justice, was right or wrong. Neither have we been influenced by the importance of the question involved, but have endeavoured to treat the matter as if the bill presented to the grand jury had been for the non-repair of a highway, or for refusing to serve the office of petty constable. But we cannot conclude without expressing our dissent from the views stated by Mr. Justice Blackburn, and our full concurrence in the opinions of the Chief Justice. In the charge of the latter in the case of *Reg.* v. *Nelson and*

Brand, the question of martial law was fully discussed, and the views arrived at supported by unquestionable authority and irrefragable argument; but Mr. Justice Blackburn rested his opinion on his own mere *ipse dixit*, and assumed certain doctrines as if the whole matter were too clear for argument. Even if the admirable exposition of the Chief Justice had not been in existence, this would have been rather too much for those who, like ourselves, had always considered the law of England as something which could not be set aside on any emergency, or for any reasons of state, or in consideration of any end to be gained, however great that might be. But to proceed in laying down the law on this vital matter, as if all that the Chief Justice had said with so much force of argument and clearness of statement went for nothing, was still worse. In a question of smaller importance this might have called forth only a slight censure, but when the highest points of our law were touched, it must be emphatically condemned.

On the case of Mr. Eyre we do not desire to pronounce any judgment, although we cannot but remark that on the facts Mr. Justice Blackburn exhibited an undue bias in favour of the defendant. The question of the guilt or innocence of the ex-Governor of Jamaica is one thing, but the question of what is the law of England on a subject of primary importance is a very different matter. The charge of a judge as to facts, like the verdict of a jury, however erroneous it may be, does not affect the law applicable to the case. But when the senior puisne judge of the Court of Queen's Bench lays down the law to the grand jury of Middlesex, on a matter of vital moment, according to his own private interpretation, and claims for his peculiar views the sanction of the Court which he represents, the country owes a deep debt of gratitude to one who, like the Chief Justice, boldly comes forward to assert the true doctrines of the law of England, and to vindicate the high Court over which he so worthily presides. Among his many claims to the esteem and admiration of his countrymen, this will assuredly not be regarded as the least.—*Law Magazine.*

CONSTRUCTIVE NOTICE.

We take it to be a principle of English law, that the purchaser of an estate is put upon inquiry into the existence of obligations on his part necessarily arising from the nature or situation of property irrespective of actual notice of those obligations. This principle was fully considered and elucidated by Lord Romilly, M.R., in the recent case of *Morland* v. *Cook*, 16 W. R. 777. The case also involves the consideration of the doctrine of *Spencer's case*, 5 Rep. 16, as to covenants running with the land; but our chief object at present is to address ourselves to the consideration of the foregoing principle.

The facts before the Court in *Morland* v. *Cook* stated as follows:—The owners in fee simple, under a deed of partition, of five adjoining estates in Romney Marsh, covenanted with each other upon the partition in 1792, that a sea-wall, which was for the common benefit of all should be maintained and kept in repair at the expense of the owners of the time being of the estates, that the expenses of repairing the sea-wall should be borne ratably, and that the expense of each owner should be a charge on his estate. The lands in question have been reclaimed, and lie several feet below the level of ordinary high-tides; they would, in fact, but for the protection the wall affords, be covered every day by the sea. People who live above the level of high-water mark, as a rule, concern themselves little with the rights and interests of those who live in levels and marshes under the protection of of sea-walls, and are little acquainted with the law of sewers so quaintly dealt with by Callis in his readings on sewers. That author tells us (p. 114) that there are nine ways whereby the duty of repairing a sea-wall arises—namely, by frontage, ownership, prescription, custom, tenure, covenant, *per usum rei*, assessment of township, and, finally, by the law of sewers. We return, however, to the case before us. The property—the liability of which under the covenant to maintain the sea-wall was the question in dispute—formed part of one of these estates, having been conveyed by the grantee under the deed of partition to a purchaser in 1829, and by him, in 1862, to the present defendant. This gentleman contended that he was a purchaser for value without notice of the liability under the covenant to repair, and therefore exempt from the obligation, because the contract under which he purchased contained a clause prohibiting him from inquiring into the title previous to the conveyance of 1829. There is no doubt that a special condition of sale limiting the extent of title is no excuse for a purchaser not insisting on the production of a deed beyond those limits, of which he had notice: *Peto* v. *Hammond*, 30 Beav. 495. But in this instance the defendant put in evidence to show that neither he nor his solicitor, had any knowledge or belief that such an obligation existed. The main question therefore, before the Court was this, whether, in the absence of actual notice of the obligation, the defendants were bound to repair, upon the obligation of making enquiry arising from the nature of the property so as to amount to constructive notice.

It is hard to imagine a case to which the doctrine of implied or constructive notice applies more nearly than the situation of an owner of marsh or fen land lying below high water mark. It must be obvious to any person of ordinary discernment holding land in such a district to what he owes his protection from the rising tide. No person, indeed, purchasing property of this kind could shut his eyes to the fact that the very existence of his

estate is due to the bank which protects it being properly maintained. Nor, as we think, can a man be heard to say that he is exempted from liability, and which a reasonable person would be bound to make.

The case of *Rex* v. *The Commissioners of Sewers of the County of Essex*, 1 B. & C. 477, where the duty of maintaining a sea-wall was cast on a proprietor by reason of frontage, seems to decide merely this, that where an owner of land in a level is bound to repair a sea-wall abutting on his land, the other owners in the same level cannot be called upon to contribute to the repairs of the wall, although it has been injured by an extraordinary tide and tempest, unless the damage has been sustained without the default of the party who was bound to repair. The case is shortly reported, at least shortly for such laborious reporters as Messrs. Barnewall and Cresswell, and does not appear to us to do much more than explain the circumstances under which one who repairs by reason of frontage is entitled to contributions from his neighbours. The Master of the Rolls, however, treats the judgment of Abbot, C.J., in that case as laying it down as a proposition of unquestionable law, that all persons enjoying the benefit of a sea-wall are bound, and are liable at common law, to repair and maintain it in the absence of any special custom to the contrary, or some special contract exempting them. "That, in my opinion, establishes this proposition as a necessary consequence," the Master of the Rolls is reported to have said, "that where a man buys land below the level of high water, and which would be daily covered by the overflow of sea water were it not prevented by the obstacle of a sea-wall, the purchaser has notice, and is already made aware, that by law he is liable to contribute to its repair."

It is plain, however, that this is a doctrine, which, unless guarded in its application, according to the view of it taken by his Lordship, may readily be carried too far. To allow liabilities not mentioned or referred to in the deed of grant to be implied against the purchaser would, in our judgment, be against public policy as tending to affect the security of possessions. The only exception that ought to be allowed is in cases where liability is, as it were, necessarily appendant to the estate, as in the case of an estate having a sea-wall for its frontage, where if a person took it without notice of the obligation to repair, the inference would be irresistible that it was incumbent on the owner for the time being to repair the sea-wall to the extent of his frontage for the benefit, not of himself merely, but of all the owners of land in the same level. We think that no stronger case can be conceived than this. The principle, in the opinion of Lord Westbury, C., and of the Master of the Rolls, was carried too far in *Pyer* v. *Carter*, 1 H. & N. 916, 5 W. R. 371. The Court of Exchequer held, in that case, that even in the absence of any reservation in the deed of grant the right to drain is reserved by implication of law over the part granted in favour of the part maintained, inasmuch as the grantee must have known that the water from the house must drain somewhere, and was therefore put upon enquiry. Now, an implication of this kind, in our humble judgment, is by no means so strong as the implication in the former case. Drains are under ground, and do not meet the eye of an intending purchaser in the same way as a sea-wall. And it is by no means a necessity that a house should be drained in any particular direction, or should be drained otherwise than into a cesspool situate on the premises; and the exact state of things could perhaps only be asceatained after a more careful inquiry than an intending purchaser is usually able to make. But when a piece of land is below the level of the sea, which is excluded from it by a sea-wall, the truth of the matter is obvious to the capacity. Lord Westbury, C., evidently thought that the doctrine of inferential notice had been carried too far when he so pointedly disapproved of *Pyer* v. *Carter*, in his judgment in *Suffield* v. *Brown*, 12 W. R. 356. We hope we shall not be thought presumptuous if we submit that *Suffield* v. *Brown* goes a little too far upon the other side of the true principle of equity. It will be seen, if we mistake not, that Lord Westbury held that if a grantor intends to reserve any right possessed by him over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant by the fiction of an implied reservation. Where the existence of the right is so obvious that it is inconceivable that its existence should be disputed, the omission to reserve it will sometimes occur, and when this is so it must surely be unreasonable that the vendor should lose a right which he would doubtless have reserved had its existence been less obvious. The doctrine of the American Courts on this subject will be found in Mr. Kerr's recent work on injunctions, p. 365, from which we make the following extract:—"The doctrine of *Pyer* v. *Carter* was also disapproved of by the Supreme Court of Massachusetts in *Carbrey* v. *Willis*, 7 Allen (Amer.), 354, and the true rule was there laid down to be in accordance with an earlier decision of the same Court in *Johnson* v. *Jordan*, 2 Metc. (Amer.), 234—that if the owner of two adjoining messuages or lots of land sells one of them, retaining the other, no reservation of the right of drain will be taken as reserved by implication of law over the part granted in favour of the part retained, unless it is *de facto* annexed, and is in use at the time of the grant, and is necessary to the enjoyment of the part retained. The principle laid down in *Pyer* v. *Carter* may be stated thus: —that if an easement be apparent and continuous, no express reservation is necessary in a grant of the servient by the owner of the dominant tenement. That the easement should be apparent and continuous is treated by Lord

Chelmsford, C., in *Crossley & Sons* v. *Lightowler*, L. R. 2 Ch. 478, as an immaterial circumstance: for *non constat* that the vendor does not intend to relinquish it unless he shows the contrary by reserving it. His Lordship grounded his decision on the rule that the law will not reserve anything out of a grant in favour of the grantor except in cases of necessity, which we take to be the case here. It seems that *Crossley & Sons* v. *Lightowler* was not referred to in argument. Had it been so we think that Lord Romilly would have considered it to express his own views of the law.

The case was in part argued upon the theory that the covenant of 1792 bound the land in the hands of the purchaser, being a covenant running with the land according to the first resolution in *Spencer's case*. And the Court was of opinion that the covenant which we have stated above was a covenant which extended to a thing in *esse*, the thing to be done being annexed and appurtenant to the land conveyed, which goes with the land and binds the assignee, although he be not mentioned in express terms; and even if this were not so, the Court was of opinion that it being manifest to the defendant when he bought his land that it was protected by the sea-wall in question, he was bound to enquire by whom that sea-wall was maintained, and must, therefore, be held bound to have had notice of all that he would have learned had he made such inquiry; and that, as by so inquiring he would have ascertained the existence of the covenant, he could not then repudiate that covenant, or refuse to perform the condition subject to which, virtually, he took the land. Whether or not the other parties to the covenant could enforce it at law, there is a class of cases of which *Tulk* v. *Moxhay*, 2 Ph. 774, is one, which establishes the principle that the right in equity to enforce performance of such a covenant does not depend upon whether the right can be enforced at law. The Court, in *Tulk* v. *Moxhay*, held that a covenant between vendor and purchaser on the sale of land that the purchaser and his assigns shall use, or abstain from using, the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land. The recent case of *Wilson* v. *Hart*, 14 W. R. 748, L. R. 1 Ch. 463, where the covenant was that the building was not to be used as a beershop, may be referred to on this point.—*Solicitors' Journal.*

ENGLISH AND AMERICAN LAWYERS.

We have had the pleasure of an interview with a member of the legal profession in New York, who unfortunately has come over at the commencement of our Long Vacation, and is thus disappointed in his expectation of seeing the courts sitting. Some points arose in our conversation which are particularly interesting at a time when the Profession in our own country threatens to assimilate itself to the Profession as it exists on the other side of the Atlantic.

In the first place we were anxious to know from a busy practitioner in New York, how the system of a single body, undivided as it is in England, works. We were not surprised to learn that the Bar, as it is called, is not very highly esteemed by the Americans. Entry into the Profession is easy; ejectment difficult. A few dollars for a diploma are all the costs necessary to incur before an aspirant may commence practice. The examinations are tolerably strict, and their stringency is not abated without good and reasonable cause.

When writing upon the suggested amalgation of the two branches of the Profession, we said that, practically, there would continue to be two classes of practitioners, although there would be an alteration of status. So we find it in America. Members of particular firms become eminent advocates, and thus obtain the business which belongs in England to the Bar. They are still, however, general practitioners, and when not engaged in court practice turn their attention to any general business of their office.

We showed our visitor two bills of costs which happened to be in our possession. They were, admittedly, very extraordinary specimens, and elicited some surprise, both on account of their intrinsic demerits and by reason of the fact that in America no costs are sent in to a client unless there be a suit. They are matter of agreement between attorney and client. Then with regard to taxation no costs whatever are allowed in connection with it. The officer does it as a matter of course, and each party is bound to appear without fee.

We then inquired of our visitor whether the absence of vestments on the bench operated adversely to its dignity. It was admitted that it did, but the remark was drily added that dignity was not accounted much of in America. The only distinguishing garment worn is a black gown, and that is confined to the Judges of one state only.

In the next place, knowing that much inconvenience is caused in this country by the difference of law and procedure prevailing in England, Scotland and Ireland, we inquired concerning the condition of America in this respect. We learned that a lawyer of one state rarely or never practises in another—that is, if he be conscientious, law and procedure both differing to so very considerable an extent. Thus we find that our acute cousins have managed to blunder in their legal arrangements in the same manner as the old mother country.

We cannot say that on the whole we are disposed to wish to see American legal forms and institutions introduced into England.—*Law Times.*

THE FRENCH BAR.

Sketches of two eminent French barristers, members of the Corps Legislatif, have been furnished to an evening contemporary. This is M. Berryer:—"It is singular that this great master of the art of oratory never addresses an audience without being seized during the first few moments of his speech with the same kind of trembling which Mirabeau confessed he invariably experienced under similar circumstances. No sooner, however, is he fairly embarked in his subject than this nervous feeling vanishes, and instead of quailing, as it were, before his audience, he appears to hold them in complete subjection. He rarely notices an interruption, but when he does it is with a disagreeable rejoinder, which at once insures silence. However intricate the question under discussion may be, he never refers to either documents or notes. His memory is the sole storehouse whence he draws his facts and illustrations, always apposite and always produced at the proper moment. He is perfectly indifferent as to the way in which his speeches are reported, and never has any intercourse with the short-hand writers of the Chamber, and, least of all, never troubles himself, like many of his colleagues, to read a proof of the report of his speech which is to appear in the *Moniteur* of the following morning." Of M. Jules Favre it is said that his "insinuating voice, eloquent academic language, gracefully rounded periods, and persuasive style of delivery, distinguish him alike at the Bar and in the Tribune. There is no man in France of whom the Democratic party are more proud, and there is certainly no man among the party of the same extreme opinions who are listened to with such attention and respect by his opponents in the Corps Legislatif. When, perhaps, some conversational discussion is going on which does not oblige the speaker to address the Chamber from the tribune, you may chance to see rise up from the fourth row of benches a man of commanding and well-developed figure, whose grey hair and white pointed beard give character to his grave-looking countenance. No sooner does he open his lips, even though he may be speaking on the most ordinary topic, than you feel interested, and it is impossible to listen to him for any length of time without being fascinated by his eloquent language, and calm, insinuating voice and manner.—"*English Paper.*

INTERRUPTION BY JUDGES.

A good story is going the round of the Chancery Bar. An eminent counsel recently spoke for two hours before one of the Vice-Chancelors, and the proceedings were reported *verbatim* by a short hand writer. It appears from his notes, that the judge interrupted the barrister precisely one hundred and thirteen times,—almost exactly once in every minute. This practice of interruption, at least in two of the equity courts, has now reached such an excess, that those tribunals are almost incessantly the scenes of indecorous wrangling or gossip, and the administration of justice is seriously impeded. The established rule with respect to the hearing a cause is logical, convenient and just. First, the party on whom the *onus probandi* lies is heard; next, his opponent; then there is a right of reply; and lastly, the court delivers judgment. That rule has prevailed for centuries; and it exists as a matter of right in every tribunal in the kingdom, whether of legal, equitable, criminal or ecclesiastical jurisdiction. It may be presumed, therefore that a usage so well established has been found beneficial. If counsel might not be heard without interruption, the next step would be not to hear at all. The evil has now grown so great in the two courts to which we refer, that counsel find connected and close argument nearly impossible, and hence they are forced into the bad habit of substituting short exclamatory sggestions. Considering the difficulty and intricacy of the subjects with which the Court of Chancery has to deal, it is obvious that this virtual prohibition of close forensic reasoning is a serious loss to the suitors. Nor should it be forgotten that the right of audience belongs to the suitor, and not to the counsel, who is his mouthpiece.—*English Paper.*

TELEGRAMS.

Vice-Chancellor Giffard has held in *Coupland* v. *Arrowsmith*, 18 L. T. Rep. N. S. 755 that a telegram is admissable in evidence as a letter, if it be properly authenticated. It was objected that, as an advertisement was inadmissible as not being under the signature or in the hand-writing of the party, so also should be a telegram, which is neither written nor signed by the sender. But it was answered that a telegram is a message by A. to B.; unlike an advertisement, which is a general notice, it differs from a letter only in this, that the sender writes it by the hand of the telegraph clerk, as he might write a letter by his secretary. But it must be authenticated, of course.

The question, therefore, arises, what is a sufficient authentication of a telegram?

To answer this, let us see what is required to be proved. It is that the message came from B. the alleged sender of it. The written instructions for messages are, we believe preserved at the telegraph offices. The first step will be to procure this document, and ascertain by whom it was written. If by B. himself, the production of it, with proof of handwriting, will suffice; but if written by another, that other must be found, and his authority, and so backward until it is traced to B. But if, as must frequently happen, it is impossible to ascertain whose hand wrote the message, or who brought it, there remain only two courses; either to call B. himself to prove it, and when

in the box he is so for all purposes—or to connect him with the telegram by other evidence; as the recognition of its contents by answers and replies, or by acts done in pursuance of, or in connection with, it. Manifestly, a telegram could not be proved merely by its production; but then it may and ought to be proposed for admission by the other party, refusing which, he would be charged with the costs of proof.

If the telegram instruction paper cannot be found, its loss should be proved by the clerk at the office who had the custody of it, and has made search for it, and then secondary evidence of it may be given by the telegraph clerk by whom the message was transmitted, who must prove that the message delivered was that sent.

As telegrams come more into use, this question of their admissibility in evidence, and the manner of proving them, becomes more important; therefore we have invited attention to it in the hope that some ingenious reader may suggest some means by which evidence of so much value may be better preserved and proved that it can be by the present arrangements.—*Law Times.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-law, Reporter to the Court.)*

Small v. Haney.

31 Vic. (Ontario), cap. 24, sec. 2, s.s. 2—Motion for full costs.

The above statute does not require that the consideration of granting or refusing a certificate for full costs should be postponed by the Judge *to any specified future time.*

[Chambers, June 29, 1868.]

This was an action on a covenant for the payment of rent, and was sent down for trial before the Judge of the County Court of the County of York. The verdict was for the plaintiff for $190.

Immediately after the verdict an application for full costs was made to the County Court Judge, which he refused, but noted the fact of the motion having been made, but he did not postpone the consideration of the matter to any particular time.

An *ex parte* application was subsequently made to the County Court Judge for a certificate for full costs, which he granted. The defendant afterwards asked him for a summons to rescind his certificate, which he refused.

Ferguson then obtained from Mr. Justice Morrison a summons to shew cause why all proceedings should not be stayed until Term, on the ground that as the consideration of the granting or refusing the certificate was not postponed to any particular time, there was no jurisdiction in a judge afterwards to grant a certificate. He referred to 31 Vic. (Ontario), cap. 24, sec. 2, sub sec. 2.

Blevins showed cause.

Adam Wilson, J., discharged the summons, as he thought that the statute did not require a postponement to any specified point of time.

Summons discharged.

Carsley v. Fisken et al.

Division Courts—Jurisdiction—Prohibition.

The defendants at Toronto agreed to sell to plaintiff at Kingston certain barrels of oil. Upon the the oil being delivered at Kingston, it was found to run short, and an action was brought for the shortage in the Division Court at Kingston. It was objected by defendants that the action could not be brought in Kingston, but the Judge overruled the objection, whereupon a prohibition was asked for, and it was

Held, that the action should have been brought where the defendants resided.

[Chambers, July 21, 1868.]

This was an application for a writ of prohibition to prevent the County Judge of Frontenac from further proceeding in an action in the first Division Court of that County, between the above parties, on the ground that said Judge had no jurisdiction to hear the case.

The facts of the case were that the defendants, who resided and carried on business at Toronto, offered by letter written at Toronto, to sell to the plaintiff, who resided and carried on business at Kingston, a quantity of coal oil at a certain price. The plaintiff at Kingston accepted the offer of the defendants by telegraph to them at Toronto, and they thereupon shipped the oil to him at Kingston. Upon its arrival, however, the plaintiff found, as he alleged, that the quantity of oil stated to have been contained in the barrels ran short, owing, as was supposed, to leakage, which it was sworn must have taken place before it reached Kingston. The plaintiff then sued defendants in the Division Court at Kingston for the shortage.

It was objected at the trial that the action could not be brought at Kingston, on the ground that the cause of action did not arise there within the meaning of the statute, and that it could therefore only properly be brought where the defendants resided, under the further provision of the statute.

The learned judge overruled the objection, and gave judgment for the plaintiff for the full amount of the claim.

The defendants then applied for a prohibition.

McKenzie, Q.C., shewed cause

The following cases were cited: *Watt* v. *VanEvery*, 23 U. C. Q. B. 196; *Kemp* v. *Owen*, 14 U. C. C. P. 432, 10 U. C. L. J. 269; *Aris* v. *Orchard*, 6 H. & N. 159.

Morrison, J.—In the case of the Judge of the County Court of Brant, in *Watt* v. *VanEvery*, the Chief Justice of Upper Canada, in giving judgment, held that the cause of action within the 71st section of the Division Court Act, is not the contract only, but the contract and breach for which the plaintiff claims damages. The sale of the oil in the present case took place where the defendants reside, at Toronto, to be delivered to the plaintiff at Kingston, and the breach is, that the full quantity of oil was not delivered to the plaintiff at Kingston, the barrels being short of measure. On the authority of the cases cited, the cause of action arose partly at Toronto and partly at Kingston, and the plaintiff must therefore sue the defendants in

the Division Court of the division in which they reside, viz., at Toronto.

The rule will go for the prohibition, but under the circumstances detailed in the affidavits there will be no costs.

Prohibition granted.

The Queen v. Patrick Boyle.

31 *Vic. cap. 16—Warrant under—29, 30 V. c. 51, sec. 357—31 V. (Ont.) c. 30, sec. 38—When alderman qualified as J. P.—Habeas Corpus—Return to.*

Held, 1. That under the Municipal Acts an alderman is not *ex officio* legally authorized to act as a J. P. until he has taken the oath of qualification required for such.

2. That a warrant of commitment under 31 Vic. c. 16, signed by one qualified J. P. and by an alderman who has not taken the necessary oath, is invalid to uphold the detention of a prisoner confined under it, though it might be a justification to a person acting under it, on an action against him.

3. That the mere fact of the warrant having been countersigned under the statute by the Clerk of the Privy Council does not withdraw the case from the jurisdiction of a Judge on a *habeas corpus*.

4. That the prisoner may contradict the return to the writ of *habeas corpus* by showing that one of the persons who signed the warrant was not a legally qualified J. P.

[Chambers, July 27, 1868.]

The prisoner, Patrick Boyle, was committed to the Gaol of the City of Toronto on the 4th May last, under the provisions of 31 Vic., cap. 16, on a charge of being a member of a treasonable society, called the Fenian Brotherhood.

An order was obtained on behalf of the prisoner from Mr. Justice Adam Wilson, upon which a writ of *habeas corpus* was issued, by virtue of which the Gaoler, on the 22nd July, brought up the prisoner, and returned to the writ that the prisoner was detained by virtue of a warrant of commitment of George D'Arcy Boulton and Geo. McMicken, Esqrs., two of Her Majesty's Justices of the Peace in and for the County of the City of Toronto, and which warrant was to the writ annexed.

The warrant, as stated on its face, was issued under the authority of the Act 31 Vic. chap. 16, and was in the following words:—

"To all or any of the Constables, &c.

"Whereas Patrick Boyle was this day charged before us, two of Her Majesty's Justices of the Peace in and for the County of the City of Toronto, on the oath of Charles Follis, for that he, the said Patrick Boyle, is a member of and hath joined a certain unlawful, illegal and treasonable association, in the said City of Toronto, called the Hibernian Benevolent Society, which Society is connected with and is part of an association in the said City of Toronto by the name of the Fenian Brotherhood; the said association being unlawfully composed of and connected with certain other lawless persons, citizens of the United States of America, being a foreign State, at peace with Her Majesty, for the purpose of making hostile incursions into Canada, and with the intent of levying war against her said Majesty, the Queen, therein, and that he, the said Patrick Boyle, hath joined himself to divers persons who have entered Canada with design and intent to commit felony within the same, and hath been guilty of treasonable practices in the city of Toronto, in said Province, contrary to the laws of the said Province and Dominion, and against the peace of our said Lady the Queen, her Crown and dignity:

"These are, therefore, to command you, the said constables, &c., to take the said Patrick Boyle, and him safely convey to the common gaol of the county of the city of Toronto, and there deliver him to the keeper thereof, together with this precept.

"And we hereby command you, the said Keeper of the said common gaol, to receive the said Patrick Boyle into your custody, in the said common gaol, and there safely keep him until he shall thence be delivered by due course of law; he being committed by us, as aforesaid, under and by virtue of a certain Act of the Legislature of the Dominion of Canada, known as "An Act to authorize the apprehension of such persons as shall be suspected of committing acts of hostility or conspiracy against her Majesty's person or Government."

"Given under our hands and seals, this fourth day of May, A. D., 1868, at the city of Toronto, aforesaid.

"(Signed),

"G. D'Arcy Boulton. [L. s]

"G. McMicken. J. P." [L. s.]

The prisoner denied, on affidavit, that he was or ever had been a member of the said Fenian society, or connected therewith, or with any secret society whatever.

The warrant and return being read and filed,

O'Donohoe moved for the discharge of the prisoner, upon the ground that the warrant was invalid, as Mr. Boulton, who assumed to act as a Justice, was not authorized or entitled to act as such, or to join in the warrant of commitment, he (Mr. Boulton) being an alderman of the city of Toronto, and not having taken the oath required by sec. 357 of the Municipal Act of 1866, as amended by the 38th sec. of chap. 30 of the Acts of last session of this Province; the Act under which the prisoner was committed requiring that the warrant should be signed by *two* Justices of the Peace. He also moved that the prisoner should be admitted to bail, if the learned judge should hold the warrant good, as it had not been countersigned by a clerk of the Queen's Privy Council, as provided by the 1st sec. of the 31 Vic. chap. 16, above referred to.

James Patterson, for the Crown, took a preliminary objection that the affidavit filed could not be read, being irregularly sworn; and he also stated that he had been instructed by the Minister of Justice that the warrant was duly countersigned within the 30 days by the Clerk of the Privy Council, and, by inadvertence of the gaoler, the proper and true return to the writ of *habeas corpus* had not been made.

It was then agreed that the prisoner should be remanded until the 24th July, when the prisoner was again brought up. The gaoler then stated that he desired to amend his return, and filed an affidavit, shewing that about the 1st of June he received from the sheriff of the county of York a certified copy of the warrant of commitment, duly certified by the clerk of the Queen's Privy Council, which certified copy he produced; and he further swore that when he made his return to the *habeas corpus*, such certified and countersigned warrant had escaped his memory, and that since he made his return he discoverod that he had it in his possession. Affidavits were also filed shewing that such countersigning was done

within the 30 days prescribed, and Mr. Patterson moved that the gaoler be allowed to amend his return; and, after hearing the parties, the learned judge ordered the return to be amended, and upon the same being read,

Patterson, for the Crown, now objected, and contended:

1. That as it appeared that the warrant had been duly countersigned, the provisions of the 31st Vic., chap. 16, deprived the judge of authority and jurisdiction to entertain the motion made on the part of the prisoner, either with a view to his discharge or to his being bailed.

2. That if a judge had authority to examine into the validity of the warrant or detention of the prisoner, Mr. Boulton, being an alderman of the city of Toronto, was also a Justice of the Peace, *ex-officio*, and that the Act of the Province of Ontario amending the Municipal Act did not apply to Mr. Boulton, and that if it did, his acts, nevertheless, as a Justice of the Peace, were not void, although he himself might be liable to a penalty, or perhaps to a criminal information, but the acts of a Justice of the Peace who is not duly qualified are not absolutely void, as he contended: *Margate Pier Co.* v. *Hannam*, 3 B. & A. 267.

3. That it was not competent for the prisoner to contradict the return made by the gaoler, which return set out that the warrant was signed by two Justices of the Peace, &c.

In reply it was alleged, that neither he nor his counsel were aware or could obtain the particulars of the charge against him, or upon what information he was arrested: that no statement was made or taken in his presence, on oath or otherwise, of the facts or circumstances of the case before his commitment, as required by the 30th sec. of the Statute relating to the duties of Justices out of Sessions, in relation to persons charged with indictable offences; and, in order to ascertain what evidence, depositions or proceedings were had touching the restraint of the prisoner's liberty, and to the end that the judge might consider the same, and the sufficiency thereof to warrant such restraint, should he hold that the warrant was not one within the operation of the 31st Vic., a writ of *certiorari* had been issued, requiring a return of the depositions, &c., under the 2th sec. of the Act of 29 & 30 Vic. "for more effectually securing the liberty of the subject." Such writ was served on the committing justice, Mr. Boulton, and on the Clerk of the Peace for the city of Toronto; and he filed affidavits shewing that neither Mr. Boulton nor the Clerk of the Peace had in their possession any proceedings whatsoever touching the commitment of the prisoner; and that upon search at the office of the County Attorney for the county of York, and at the office of the clerk of the Police Court of the city of Toronto, no papers or documents were to be found.

Under the 39th sec. of chap. 102, the information, depositions, &c., should have been delivered by the Justice, without delay, to the County Attorney, or the Clerk of the Peace for the city. No depositions were produced on the part of the Crown.

MORRISON, J.—After carefully considering the whole case, I am of opinion that the prisoner is entitled to be discharged. It appears, as already stated, that he was arrested on the 4th May last under the warrant referred to, purporting to be signed by two Justices of the Peace for the city of Toronto. It is clear that Mr. Boulton (one of them) was not acting under any commission as a justice, but that he was an alderman of the city of Toronto, and it is manifest that he, as such alderman, did not take the oath of qualification, as provided by the 38th sec. of the statute of the Province of Ontario. These are the most important facts appearing and bearing on the case.

Several objections in point of law were taken by the Crown. First, as before stated, that the warrant being duly countersigned by the Clerk of the Privy Council that the subject matter was wholly withdrawn from my jurisdiction. I see nothing in the statute to warrant such a conclusion. The object of the Legislature and the words of the statute indicate that, as some protection to persons who might be charged with any of the offences mentioned in the Act of Canada (31 Vic. chap. 16), they could only be committed upon a warrant signed by two Justices, and such warrant, being countersigned within 30 days, as provided, then, in such case, no Judge should bail or try any such prisoner without an order from the Queen's Privy Council of Canada. The object of the statute, so far as any of the offences mentioned therein, was to suspend the operation of the writ of *habeas corpus*, and to deprive the subject restrained of his liberty of one of the most inestimable of privileges; and it is my duty to see, in favor of liberty, that the provisions of the statute are scrupulously observed. If it appears that the provisions of the statute have been observed, and that the warrant is in accordance therewith, in such case the prisoner's liberty is entirely in the hands of the Privy Council.

It was not attempted to be argued that if the Clerk of the Privy Council countersigned a warrant signed by only one Justice, that such a warrant would justify the detention of a prisoner under the statute, without bail or trial. So here, if Mr. Boulton was not authorized to act, or could not lawfully sign a warrant as a Justice, the prisoner's case would not be within the operation of the statute. Then, as to the second objection, that the affidavit cannot be received to contradict the return, the gaoler returning that the prisoner was detained under a warrant signed by two Justices of the Peace, naming them. The return just amounts to this—the cause of the detention was the warrant annexed. It would be absurd to hold that because the gaoler in his return designated the parties who signed the warrant as two Justices, an investigation into the fact was precluded. In *Baily's case*, 3 E. & B. 614, Lord Campbell allowed the prisoner to use affidavits to shew that the Justices had no jurisdiction. So here, I am of opinion, that it is competent to the prisoner to shew that the persons signing the warrant have no authority to act as Justices. But the point is disposed of by the 3rd sec. of chap. 45 of 29 & 30 Vic., which was not referred to in the argument. That section provides that although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for any Judge before whom such writ shall be returnable to proceed to examine into the truth of the facts set forth in

such return, by affidavit, and to do therein as to justice shall appertain, &c.

The only question that remains upon the present return is, whether the further detention of the prisoner can be sustained by this warrant, upon which two points arise: 1st., whether Mr. Boulton was lawfully authorized to act as a Justice of the Peace for the city of Toronto. 2nd. If he was acting unlawfully, by reason of his not first taking the oath of qualification, was the act of his signing the warrant invalid, so far as the detention of the prisoner is concerned?

By the 357th section of our Municipal Act, as amended by the 38th sec. of 31 Vic. cap. 30 of the statutes of Ontario, passed on the 4th March last, it is enacted that the Reeve of every town, &c., shall be, *ex-officio*, a Justice of the Peace for the whole county, &c., and aldermen in cities shall be Justices of the Peace in and for such cities: *Provided always*, that before any Alderman or Reeve shall act in the capacity of a Justice of the Peace for the city or county, he shall take the same oath of qualification, and in the same manner as is by law required by Justices of the Peace." And the amending Act repealed all Acts or parts of Acts inconsistent with its provisions relating to the Municipal Institutions of Upper Canada. So that, whatever authority Mr. Boulton, being an alderman, had as a Justice of the Peace, previous to the 4th March, was gone, and after that date, the date of the passing of the amending Act, his authority to act as a Justice of the Peace depended upon the 357th sec. as amended. And as it is in fact admitted that Mr. Boulton did not take the oath of qualification, and did not comply with the 357th section referred to, he was acting unlawfully and in contravention of the statute. I do not mean to say that Mr. Boulton was acting wilfully in the matter, because, from the affidavits filed, he appears to have acted in ignorance of the then state of the law. Then, did the neglect of Mr. Boulton to take the oath required, and which the statute makes a condition precedent to his acting as a Justice of the Peace, render his act invalid for the purpose of the imprisonment of the prisoner? It is contended by the Crown that the proviso added to the 357th section did not prevent an alderman from acting as a Justice of the Peace without taking the oath; that by his doing so it only subjected him to be prosecuted; and the case of the *Margate Pier Co.* v. *Hannan et al.*, 3 B. & A. 267, was relied on as an authority. I perfectly concur in that decision and the grounds upon which the judgment is rested, viz., that the acts of a Justice of the Peace who has not duly qualified himself are not absolutely void, so that a seizure under a warrant signed by him would not make the parties who executed it trespassers. And so in the case of the warrant now before me, as in the case alluded to; it might form a good justification to an action brought against any person or officer who acted under it, and that any act done under it, such as the detention of the prisoner in custody, would very properly be sustained. But there, I think, its validity ends; that while it is not absolutely void, yet, upon an application of this nature, it is so far defective that a person detained in custody under it may be discharged. It seems to me it would not be quite consistent to hold that while a magistrate would be liable to be indicted and punished for the act of signing a warrant, a person arrested under it would nevertheless be liable to be detained in custody. On grounds of public policy, I can see good reason why acts done under such a warrant should be justified and sustained, but I cannot bring myself to the conclusion that it is a sufficient warrant for the detention of the prisoner. In doubtful cases the Courts always lean in favor of liberty, and upon this point the prisoner is entitled to my judgment in his favor.

The only other matter for consideration is, whether the warrant, being signed by Mr. McMicken, whose authority as a Justice of the Peace is not objected to, the prisoner should not be held to bail, but in that view of the case I have nothing before me to shew that any charge was made against the prisoner, or that proceedings were had to authorize any such commitment, such as the examination of the prisoner, &c. The prisoner positively denies under oath that he is guilty of any such charge as is mentioned in the warrant. He has taken, as already stated, the usual steps to ascertain and bring before me, by writ of *certiorari*, the grounds of the charge and the proceedings taken against him without effect, and on the part of the Crown nothing is shewn. I therefore see no grounds for the further detention of the prisoner, and he must be discharged.

Prisoner discharged.

Lovell v. Wardroper.

Interpleader—Security for costs—Delay.

Held, 1. That an execution creditor made a defendant in an interpleader issue may be ordered to give security for costs; but that

2. A delay in applying for security from the 2nd July until the 11th August, is fatal to the application.

Chambers, August 21, 1868.]

This was an application by the plaintiff in an interpleader issue for security for costs, on the ground that the defendant resided out of the jurisdiction, the plaintiff being the claimant and the defendant the execution creditor.

On the 16th June the interpleader order was made, on the 20th June demand of security for costs was served, on the 2nd July the interpleader issue was delivered, and on the 11th August the application for security was made.

Draper, C. J.—*Williams* v. *Crossling*, 4 D. & L. 660, shews that an execution creditor, made a defendant in an interpleader issue, and resident out of the jurisdiction, will be compelled to give security for costs. If he had been left to sue the sheriff for not executing his writ, he must have given such security. But this application should, according to the rule of court, be made before issue joined. Here there has been a delay from 2nd July to 18th August, and plaintiff knew on 20th June that defendant resided out of the Province, and demanded security.

Summons discharged.

ENGLISH REPORTS.

CHANCERY.

Re Kershaw's Trusts.

Will—Trustees—Advancement to husband.

A married woman being entitled to the income of a fund for her separate use, and the trustees of the will having powr to advance a portion of the capital for her benefit, theywere authorised by the Court, under the circumstances of the case, to make the advance for the purpose of setting up the husband in business.

[V. C. M. 16 W. R. 963.]

This was a petition for the advice of the Court under 22 & 23 Vict. c. 35, s. 30. The question turned upon the following clause in a will. After directing the residue of his personal estate to be divided between his daughters in equal shares, the income of each daughter's share to be paid to such daughter for her life, and during coverture for her separate use, and the capital to be held in trust for her children or other issue as she should appoint, with the usual clause as to maintenance and education, the testator proceeded; "And I also empower my trustees nothwithstanding the trusts herinbefore declared of the share of each daughter of mine to apply at any period or periods of the life of each such daughter for her advancement or otherwise for her benefit any part or parts not exceeding in the whole one-half of the capital of her share." The husband of one of the daughters was offered a share in a profitable business in London, on condition of bringing £5,000 into the partnership, and it was the desire of himself and his wife that the money should be advanced out of the capital of his wife's share under the above will; but the trustees were advised that they could not safely consent without the sanction of the Court. It was represented that if the money were not advanced the husband would be obliged to return to his former employment in the East Indies, whither his wife and children would be unable to accompany him on account of the climate.

Osborne, Q. C., for the petitioners.

Cotton, Q. C., appeared to consent on behalf of all other parties interested, with the exception of three infant children residing out of the jurisdiction, whom it was not thought necessary to serve.

Malins, V. C., considered that, as a general rule, whatever was for the benefit or the husband was for the benefit of the wife, and therefore sanctioned the proposed arrangement.

IRISH REPORTS.

QUEEN'S BENCH.

Holland v. Eastwood.

Practice—Irregularity—Costs incurred by attorney's neglect.

Where the copy of a plant served was entitled "Court of Common Pleas," but was tested as of the "Court of Queen's Bench," the writ being in fact issued from and the plant being filed in the Queen's Bench, the Court set aside the judgment marked by default on the defendant's affidavit that he was misled, and that he had searched the Court of Common Pleas for a plaint, and had his defence thereto prepared and ready for filing.

As the defendant had let five days pass without giving plaintiff notice of the error, and at the end of that time had served notice of motion, no costs were given.

As the default on both sides was personal neglect of the attorneys, neither was permitted to charge the costs to his client.

[Q. B. (Ir.), May 4, 16 W. R. 934.]

P. Keogh applied on behalf of the defendant in this case to set aside the judgment marked against him. The copy of the summons and plaint served was entitled "Court of Common Pleas," but concluded "Witness the Lord Chief Justice and other Justices of the Court of Queen's Bench."

The action, which was for breach of promise of marriage, was, in fact, in the Court of Queen's Bench.

The plaintiff's attorney made an affidavit stating these facts, and also alleging that he and his counsel were misled by this mistake, and that he searched the Common Pleas, and found no plaint filed there, and that he had counsel instructed, and the defence ready for filing, and that in consequence no defence was lodged in the Queen's Bench.

The plaint bore date the 28th March, was served 31st March, filed 8th April, and judgment marked by default on the 14th April.

On the 22nd April the defendant was served with a notice to assess damages, which was the first he heard of judgment being marked against him, and the first time he notiesd the error which misled him. Nothing was done by the defendant, however, till the 27th April, when he served notice of this motion.

The plaintiff withdrew his notice to assess damages on the 2nd May.

R. Ferguson, contra, submitted that the defendant was too late, as this was an irregularity which he might waive. He cited Chitty's Archbold, 11 Ed. 204, 976; *Woodroffe* v. *Dimsdale*, 5 Ir. Jur. 239; *Holmes* v. *Russell*, 9 Dowl. 487.

Whiteside, C. J.—The defendant naturally looks to the head of the document served to see what court it is in, and the plaintiff has no right to issue a writ likely to mislead. The defendant, however, on discovery of the error, says nothing, but waits for five days, and at the end of that time serves notice of this motion. The judgment must be set aside, but both sides must pay their own costs. Where a technical error has taken place, one professional man is bound to give the other notice at once; if that had been done here, the rule as to costs would take a different shape.

O'Brien, J., concurred.

Fitzgerald, J.—There were faults here on both sides, but it is our duty to encourage a fair and candid practice. The first notice the plaintiff got of the error was the notice of this motion, which is a most warlike motion, served five days after the discovery of the defendant, obviously for the purpose of making costs by taking advantage of the slip of the plaintiff. I concur that there should be no costs, but further suggest that it should be added to the rule that neither plaintiff's nor defendant's attorney should be permitted to charge his client the costs incurred by his neglect.

George, J., concurred.

Rule accordingly.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE AND JULY, 1868.

(Continued from page 212.)

Account.

Plaintiff agreed to act as defendant's manager, receiving 7½ per cent. per annum of the profits of the business, to be made up to £500 in any year in which the said share of profits should be less than that sum. The works were valued at the same time. Six years later the defendant sold them at a gain of £47,916. In taking the account, under the above agreement, *held*, that the defendant was not entitled to charge interest on his capital, nor interest on old debts, nor the £500 guaranteed to the plaintiff in the profit and loss account. That he might charge them the depreciation, from the waste of machinery and running out of his lease, calculated on the valuation of the works. That the plaintiff could not charge 7½ per cent. on the gain at which the works were sold as profits of that year.—*Rishton* v. *Grissell*, Law Rep. 5 Eq. 326.

See Equity Pleading and Practice, 1; Lunatic; Patent, 1.

Ademption.

A testator bequeathed the income of certain shares specifically, and bequeathed the shares to his residuary legatee. After the date of his will, he was found a lunatic; and, by an order in lunacy, the shares were directed to be sold, and the proceeds were invested in consols. There was no order as to the ownership of the proceeds. *Held*, that the sale was a conversion, and adeemed the legacy of income which fell into the residue.—*Jones* v. *Green*, Law Rep. 5 Eq. 555.

Administration.

1. A testator died domiciled in New South Wales, and the court there granted probate of his will to A. as executrix, according to the tenor. A. was not so by the law of England. *Held*, that the grant of the court of the domicile ought to be followed. Administration with the will annexed was granted to A., not as executrix, but, under St. 20 & 21 Vict. c. 77, § 73, to her as the person entitled to administer under the grant of the court of the country of domicile.—*In the Goods of Earl*, Law Rep. 1 P. & D. 450.

2. A. was appointed executor, and "in case of his absence on foreign duty," B. was made executrix. A. was in England at the death of testator, but was absent on foreign service in the royal navy when the probate was applied for, and was likely to be absent for some years. Probate was granted to B.—*In the Goods of Langford*, Law Rep. 1 P. & D. 458.

See Banker; Estoppel; Exoneration.

Admiralty.

The plaintiff, a British subject, shipped as mate on board a Portuguese vessel, and signed an agreement to be bound by the Commercial Code of Portugal, which requires that all disputes arising between masters and seamen shall be submitted to the Portuguese Consul, in the country where the vessel may be. Without having done this, plaintiff arrested the vessel, and began a suit against the owner in the Admiralty Court. In accordance with the 10th of the Admiralty Court Rules, 1859, notice of the suit was sent to the Portuguese Consul in London, who thereupon protested against the same. On motion of the defendant, the court decreed that the vessel should be released, and condemned the plaintiff in costs and damages. The above rule was not abrogated by 24 Vict. c. 10, § 10, giving jurisdiction to the court over any claim by a seaman of *any* ship for wages and disbursements.—*The Nina*, Law Rep. 2 Adm. & Ecc. 44.

Affirmed on appeal, except as to costs and damages, which were not allowed, as the merits had not been tried. The Admiralty Court has jurisdiction, however, of such cases, and will determine whether, having regard to the reasons of the Consul and the answers of the plaintiff, it is fit for the suit to proceed.—*La Blache* v. *Rangel*, *The Nina*, Law. Rep. 2 P. C. 38.

See Collision; Salvage.

Advancement.

A widow, after making a will in favor of her two daughters, transferred East India stock, which had stood in her own name, into the joint names of herself and the unmarried daughter, and died. While she lived, she always received the dividends, and applied them to her own use. *Held*, that the stock belonged to the unmarried daughter absolutely. —*Sayre* v. *Hughes*, Law Rep. 5 Eq. 376.

Agent—*See* Principal and Agent.

Agreement—*See* Contract.

Allotment—*See* Company.

Amalgamation—*See* Ultra Vires, 2.

Amendment—*See* Award.

Apportionment—*See* Partnership.

Appropriation of Payments.

New trustees proved against the estate of a defaulting trustee for the aggregate amount of the principal trust fund and arrears of interest,

but recovered a sum less than the principal. *Held*, that said sum must be treated as capital. But one having a life estate therein was entitled to the future interest of the same.—*In re Grabouski's Settlement*, Law Rep. 6 Eq. 12.

Arbitration—*See* Award.

Arrest—*See* Assault.

Assault.

The prisoner assaulted a constable in the execution of his duty. The constable went for aid, and after an hour returned with three others, but found the prisoner had locked himself up in his house. Fifteen minutes later the constables forced the door, entered, and arrested the prisoner, who wounded one of them in resisting the arrest. *Held*, that the arrest was illegal.—*The Queen* v. *Marsden*, Law Rep. 1 C. C. 131.

Assets—*See* Execution; Winding Up, 2.

Assignment—*See* Attachment.

Assumpsit—*See* Vendor and Purchase of Real Estate.

Attachment.

1. A prior equitable assignment of railway shares in the hands of the garnishee is a bar to a foreign attachment, although no notice of such assignment has been given to the garnishee.—*Robinson* v. *Nesbitt*, Law Rep. 3 C. P. 264.

2. A railway company assigned, by a deed containing a power of sale, a call which had been made, but was not yet payable, as security for a debt then due to the plaintiff. After the same had become payable, the defendants obtained a garnishee order *nisi* against a shareholder. The shareholder had no notice that the deed of assignment had been sealed at the time of the service of said order upon him, but had presided at the board at which the sealing was directed. *Held*, that the assignment was not *ultra vires;* that it was not made void by the power of sale, as, if said power was invalid, it would be expunged by the Court of Chancery; and that the shareholder had notice. *Quære*, whether notice was necessary as against a subsequent judgment creditor.—*Pickering* v. *Ilfracombe Railway Co.*, Law Rep. 3 C. P. 235; *Watts* v. *Porter*, 3 E. & B. 743, overruled. See *Robinson* v. *Nesbitt*, Law Rep. 3 C. P. 264.

Award.

The plaintiff sued A., B., and C., upon a joint contract, and after plea entered a *nolle prosequi* as to B. and C. Afterwards an order of reference was drawn up, by consent, on a printed form, which contained no power to the arbitrator to amend. Before the arbitrator it was set up that the *nol. prqs.* as to B. and C. discharged the defendant, and the plaintiff sought to amend. *Held*, that he could not. Unless there has been an omission by an officer of the court, or an accident or mistake, owing to which it is not in accordance with the intention of either party, or fraud, a consent order will not be altered by the court. (Per Bovill, C.J.) Nor could it be done indirectly by amending the record under § 37 of the Common Law Procedure Act, 1852, by striking out the names of B. and C., at least when they were joined as defendants intentionally, to fix all three with liability.—*Vanderbyl* v. *McKenna*, Law Rep. 3 C. P. 252.

Banker.

Appellants, bankers, had policies on the life of one deceased as security for money due from him to them. To obtain payment of these, they received the probate of his will from his widow and executrix, promising to make over the balance to her. Said probate showed remainders to children after the widow's life estate. The latter drew a cheque for said balance, payable to a firm composed of herself and her husband's former partner, which banked with appellants, and the amount was placed to the credit of the firm accordingly. In a suit by the children, *held*, by the House of Lords, reversing the decree of the Lord Chancellor of *Ireland*, that the bankers were not liable to replace said balance. To justify a banker in refusing to pay a cheque drawn by a customer as executor, there must be a breach of trust intended by the latter, and the banker must be privy to that intent. Proof that any personal benefit to the bankers themselves is designed or stipulated for, is the strongest evidence of such privity.—*Gray* v. *Johnston*, Law Rep. 3 H. L. 1.

Bankruptcy.

1. R., having a contract to supply meat to a lunatic asylum for six months from April 1, assigned it on that day to H., who delivered his own meat in R.'s name, without the knowledge of the asylum. R. became bankrupt, and his assignee claimed the sum then due for meat as "goods and chattels" in the "possession, order, or disposition" of R. as reputed owner with the consent of H., the true owner, within the Bankrupt Act 12 & 13 Vict. c. 106, § 125. *Held*, that the debt passed to the assignee.

(Per Willes, J., *dissentiente*). The meat never having been in R.'s possession, the debt arising thence was not within his possession,

order, or disposition.—*Cooke* v. *Heming*, Law Rep. 3 C. P. 334.

2. A shareholder under the Companies Act, 1862, who has become bankrupt and received his discharge, but retains his shares, is not discharged from liability to pay subsequent calls, whether made while the company is in operation, or when it is being wound up, either under § 75 of said act, or under the Bankrupt Act, 1861, § 154.—*Martin's Anchor Co.* v. *Morton*, Law Rep. 3 Q. B. 306.

See Appropriation or Payments.

Betting—*See* Gaming.

Bequest—*See* Legacy.

Bills and Notes.

In an action against the indorser, "Pay J. S., or order, value in account with H. C. D.;" *held*, not a restrictive indorsement.—*Buckley* v. *Jackson*, Law Rep. 3 Exch. 135.

See Limitations, Statute of, 2; Stamp.

Bond—*See* Debenture; Vendor and Purchaser of Real Estate.

Call—*See* Attachment, 2.

Canada, Law of.

A *défense d'aliéner pur et simple*, viz., a provision against alienation for twenty years from death of testator in the interest of no one but the devisee, is void by the old French law in force in Lower Canada, founded on the Roman law, and by the general principles of jurisprudence.—*Renaud* v. *Tourangeau*, Law Rep. 2 P. C. 4.

Cancellation—*See* Vendor and Purchaser of Real Estate.

Cause of Action.

A contract was made abroad, but broken in England. *Held*, that the "cause of action" did not arise within the jurisdiction within the meaning of the Common Law Procedure Act, 1852, §§ 18, 19.—*Allhusen* v. *Malgarejo*, Law Rep. 3 Q. B. 340.

Carrier—*See* Railway.

Charter Party.

1. By a charter party the charterer agreed to load "a full and complete cargo of sugar in cases, or other lawful merchandise, with sufficient bags for broken stowage," at a certain rate of freight per ton for sugar, and for "other produce a rate proportionate to sugar in casks, with sufficient bags for broken stowage, agreeably to the custom of the port of loading." The charterer took a full cargo of cotton, with sixty tons of stone for ballast, which would have been unnecessary if sugar had been loaded. By the custom of the loading port, 928 pounds of cotton was to be taken as equal to a ton of sugar. *Held*, that a full cargo had been loaded. The charterers were not bound to ship sufficient bags for broken stowage with any other cargo than sugar in cases.—*Duckett* v. *Satterfield*, Law Rep. 3 C. P. 227.

2. Defendant agreed to load plaintiff's ship with coal in regular turn, "except in cases of riots, strikes, or any other accidents beyond his control," which might prevent a delay in loading. A snow-storm prevented the loading. *Held*, not an "accident" within the above exception.—*Fenwick* v. *Schmalz*, Law Rep. 3 C. P. 313.

3. The case of *Hudson* v. *Ede*, Law Rep. 2 Q. B. 566 (*ante*, 2 Am. Law Rev. 272), was affirmed in the Exchequer Chamber, Law Rep. 3 Q. B. 412.

Cheque—*See* Banker; Limitations, Statute of, 2.

Children, Custody of—*See* Custody of Children.

Chose in Action—*See* Bankruptcy, 1; Vendor and Purchaser of Real Estate.

Collision.

In cross suits between a sailing vessel and a steamer, the Court of Admiralty held both vessels to blame, and decreed the damages to be equally divided between them. As the sailing vessel was sunk, this was, in effect, a severe judgment against the steamer, which appealed. Nothing appeared in the sailing vessel's case why, if she acted wrongly, the steamer should have been held to have been in the wrong also, and, on the evidence, the steamer seemed to have acted rightly. The decree was reversed. That the sailing vessel did not make out her case was *res judicata*, she not having appealed.—*Inman* v. *Rack*, *The City of Antwerp*, and *The Friedrich*, Law Rep. 2 P. C. 25.

See Salvage.

Common Carrier—*See* Railway.

Company.

1. In October, 1865, A. received from a private source what purported to be a prospectus of a company then about to be formed, upon reading which, and from its language, expecting an immediate allotment, he applied for ten shares, and paid the required deposit to the bankers named therein. In January, 1866, A. received the authentic prospectus, which differed materially from the document before received. February 1, the directors met for the first time and allotted the shares, among others to A.; and it was taken, in deciding the case, that A. received the letter of allotment Feb. 3. Feb. 7, A. wrote, declining to take any shares, and requesting a return of

his deposit. His letter was received the next day, on which day the shares were registered. He shortly after wrote again to the same effect. Notices of a call and of a dividend were sent to A., but not noticed by him; and in October, 1867, legal proceedings were threatened in default of his payment of arrears. *Held*, that the allotment not having been made for four months after A.'s application, A. was entitled to a *locus pœnitentiæ*, and had a right to repudiate the shares on the 7th of February.—*In re Bowton, Baily & Co., Baily's case*, Law Rep., 5 Eq. 428.

2. A company, having a line built and at work, began an extension line, the capital to be raised as portions of the general capital, by the creation of new shares, the holders of which were not to have more than six per cent. for the first three years. The directors charged to capital one-half the office expenses, and interest upon debentures for the extension line, and made a dividend to extension shareholders from interest paid by the contractors in respect of the same being unfinished. A dividend on the old stock was declared on this basis. An interlocutory injunction was granted by Wood, V.C., on the application of one who had bought extension stock for the purpose of filing his bill, on the ground that the above charges were wrong. On appeal, Lord Chelmsford, L.C., continued the injunction until final hearing, on the ground that the questions were of importance and doubt, and, if the dividend were paid, it would not be recovered, which would be an irreparable injury to the extension stockholders. But as the balance carried over to the next half year on the revenue account was much larger than the charge for office expenses, even if it was wrong, it was not a ground for the injunction. *Semble*, that if the extension line had been a separate undertaking, not as yet yielding income, the interest of a debt incurred to construct it should have been charged on the capital; but it being part of a general undertaking, yielding profit as a whole, *quære*, whether such debt should be charged to capital or not. The dividend extension shareholders was right; unless, as charged in the bill, the amount was to be refunded to the contractors by the company. If the directors were acting *ultra vires*, it could not be set up that these were matters of internal management, which the court would not disturb. The plaintiff having a real interest, and the suit being *bona fide* his own, he could maintain his bill in spite of his mode of introduction to the company; so, also, in spite of these charges having been acquiesced in by former holders of the stock purchased by him. —*Bloxam* v. *Metropolitan Railway Co.*, Law Rep. 3 Ch. 337.

3. A railway company, with an act limiting the time of its power for the compulsory purchase of land to four years, and allowing five years for completing the line, after which the powers granted to it were suspended as to any uncompleted portion, served a notice to treat within four years on land-owners, whose claim for compensation was not assented to. Nothing further was done till the five years had expired, when the company claimed to proceed under the notice. On a bill for an injunction by the land-owners, *held*, that the company could not so proceed. The notice did not of itself create a contract, and only operated for a reasonable time, which was within the time allowed to finish the line.—*Richmond* v. *North London Railway Co.*, Law Rep. 5 Eq. 352.

4. The defendant company, by the Railways Clauses Act, 1845, § 16, were empowered to divert ways, subject to the Lands Clauses Act. Section 84 of the latter prohibits entry upon lands to be permanently used for the purposes of the act, until the same had been paid for. *Held*, that the former section did not authorize the company to divert a public footpath on to land of which the company had not obtained the ownership. (Per Lord Cairns, L.J.) A highway is not an easement, but the dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing; the public generally assuming the obligation of repairing it. This is a permanent user of the land, within sec. 84.—*Rangeley* v. *Midland Railway Co.*, Law Rep. 3 Ch. 306.

See Attachment, 2; Bankruptcy, 2; Contributory; Debenture; Execution; Negligence, 2; Rent Charge; Ultra Vires; Winding up.

Condition—*See* Canada; Patent, 2.

Conflict of Laws.

1. After an English marriage between two English persons, obtained by the fraud of the husband and never consummated, the husband committed adultery. Some years later he went to Scotland, to found a jurisdiction against himself, for which he was to receive a sum; to be forfeited, however, in case he gave any information which should be prejudicial to a divorce. After a residence of forty days, a divorce *a vinculo* was obtained against him, and a marriage was thereupon duly celebrated between the wife and an Eng-

lishman who was thenceforth domiciled in Scotland. After the death of all the above parties, *held*, that the children of the last marriage were not "lawfully begotten," so as to take English property under an English will. *Lolley's Case* explained and approved.—*Shaw* v. *Gould*, Law Rep. 3 H. L. 55; s.c. *Wilson's Trusts*, Law Rep. 1 Eq. 247 (*ante* 1 Am. Law Rev. 115).

2. B. had left Jamaica, his domicile of birth, for good, and gone to Scotland, where afterwards he acquired a domicile; but it being *held*, that, at the time in question, his mind was not made up to stay there permanently, it was further *held*, that the personal *status* of the domicile of birth remained until a new domicile was acquired.—*Bell* v. *Kennedy*, Law Rep. 1 H. L., Sc. 307.

See Administration, 1.

Confusion—*See* Mortgage, 1.

Consul—*See* Admiralty.

Contingent Remainder.

Devise to A. for life, remainder to the children of testator's grandson, B., "if he leave any him surviving, but, in case he leave no child him surviving," to the children of C. B. survived A., at whose death he had three children, and two had been born since. *Held*, that B.'s children took a remainder contingent during his lifetime, which failed by the dropping of A.'s life estate in the lifetime of B., and that B. was entitled as heir at law.—*Price* v. *Hall*, Law Rep. 5 Eq. 399.

See Will, 5.

Contract—*See* Damages, 2; Sale; Vendor and Purchaser of Real Estate.

Contribution—*See* Marshalling of Assets Power.

Contributory.

1. Before a past member of a joint stock company, limited, can be made a contributory under the Companies Act, 1862, § 38, it must be proved, that, at the date of the winding-up order, there was some debt of the company which was due when he transferred his shares, and also that said shares have not been fully paid up.—*In re Contract Corporation, Weston's Case*, Law Rep. 6 Eq. 17.

2. C., a registered shareholder, sold his shares to S., who had the transfer made out to A., an infant, and A. was registered as holder of the shares. In November, 1865, C. was notified by the company that he was held liable for a call, as holder of said shares. C., finding that A. was registered, and that new certificates had been issued to him, did nothing. In January, 1867, the demand was renewed, after a resolution for winding up the company had been passed. *Held*, that C. was liable as a contributory.—*In re China S. & L. C. Co., Capper's Case*, Law Rep. 3 Ch. 458.

Conversion—*See* Ademption.

Copyright.

1. By the International Copyright Act, 7 Vict. c. 12, § 6, no author or his assigns of any musical composition first published abroad, shall be entitled to the benefit of the act, unless the name and place of abode of the author or composer of said composition are registered in England. N. composed and published an opera in full score at Berlin, and, after his death, B. arranged the score of the whole opera for the piano-forte; in registering this arrangement, N.'s name was inserted as composer. *Held*, that the entry was invalid, and gave no title to the assignee of the registered composition. The said arrangement was an independent musical composition, of which B., not N., was the composer (Exch. Ch.).—*Wood* v. *Boosey*, Law Rep. 3 Q.B. 223; s.c. Law Rep. 2 Q.B. 340 (*ante*, 2 Am. Law Rev. 110).

2. By 25 & 26 Vict. c. 68, § 4, the register of copyrights in paintings, &c., is to contain "a short description of the nature and subject of the work." By § 6, one who shall, without the consent of the proprietor, copy such work, or, knowing that such copy has been unlawfully made, shall sell any copy of the work, or of the design thereof, shall, for every such offence, forfeit not more than £10.

G., owning the copyright of certain works, entered them thus: "Painting in oil, 'Ordered on Foreign Service;' painting in oil, 'My First Sermon;' photograph, 'My Second Sermon.'" The first was a picture of an officer taking leave of a lady; the second, of a child in a pew, listening, with eyes wide open; the photograph represented the same child asleep in a pew. B. sold on two days, in two parcels, knowing them to have been unlawfully made, twenty-six photographic copies of *engravings* of the pictures, in which engravings G. also had the copyright. On a complaint, alleging the sale of a copy of the *picture*, B. was convicted in a penalty for each copy sold. *Held*, that the above descriptions were sufficient under § 4; that the complaint alleged an offence under § 6; and that a penalty was properly imposed for each copy sold.—*Ex parte Beal*, Law Rep. 3 Q. B. 387.

Covenants—*See* Patent, 2.

Costs—*See* Equity Pleading and Practice.

Criminal Law—*See* Assault; Larceny.

Curtilage.

A public-houses was bounded north by a street, and east by a vacant piece of ground not fenced off from the street, and only separated from the house by an unfenced foot pavement used by the public as a thoroughfare, but sometimes closed. Said ground had been treated as passing to the lessee of the public-house since 1802. It was used by customers, and gave the only means of approach for vehicles to the front door of the house. *Held*, that said ground was part of the curtilage to the house, and so part of the "house," within Lands Clauses Act, § 92.—*Marson* v. *London C. & D. Railway Co.*, Law Rep. 6 Eq. 101.

Custody of Children.

The court gave the custody of two infant children—the one being three or four years, the other eighteen months old—to the mother, pending a suit for dissolution of marriage by the father, on the ground that her health was suffering from being deprived of their society, and that they were living with a stranger, not the father.—*Barnes* v. *Barnes and Beaumont*, Law Rep. 1 P. & D. 463.

Custom—*See* Principal and Agent.

Damages.

1. The defendants, mortgagees of the lease of a house, sold it to plaintiff, possession to be given on completion of the purchase. The plaintiff resold, at an advance of £105, to G., who wanted the house for occupation. The title proved satisfactory; but the mortgagor was in possession, and refused to give it up. The defendants could have ousted him by ejectment, but refused to complete the sale, on the ground of expense. *Held*, that the plaintiff could recover damages for the loss of his bargain to the amount of the profit on the re-sale. *Flureau* v. *Thornhill*, 2 W. Bl. 1078, distinguished.—*Engel* v. *Fitch*, Law Rep. 3 Q. B. 314.

2. The defendant contracted in writing to sell to the plaintiff 500 tons of iron, to be delivered by the 25th of July. Owing to an accident in his furnaces, in that month, the defendant delivered none of the iron by the 25th; but proposed that the plaintiff should take iron of a different quality, at the same time denying his liability, on the ground of the accident. This proposal was declined, after consideration. Dec. 29, the brokers who had acted for both parties, and were still acting for the plaintiff, wrote that the parties who had contracts for the iron were pressing them, and threatened to purchase against the defendant; adding, "when our Mr. T. waited upon you, he was informed it might take three months to put the furnaces into repair, and we informed all our friends to this effect, who have waited considerably over that time. . . . When do you think we may promise deliveries?" The defendant answered, not denying these statements, and only stating that he could not say what would be done with the furnaces. The plaintiff bought in the market, in Feb., and, the price of iron having risen, sought to recover from the defendant the difference between the contract price and the market price in February. The jury returned a verdict for that amount. *Held*, that there was evidence from which the jury might infer that the plaintiff's delay was at the defendant's request; that as the evidence went to show, not a new contract, but simply a forbearance by the plaintiff, at the request of the defendant, the Statute of Frauds did not apply; and that the verdict ought to stand (Exch. Ch.).—*Ogle* v. *Earl Vane*, Law Rep. 3 Q. B. 272; s.c. Law Rep. 2 Q. B. 275 (*ante* 2 Am. Law Rev. 113).

Debenture.

1. Debentures issued by a company, under a general power of borrowing, in part discharge of existing debts, are valid.—*In re Inns of Court Hotel Co.*, Law Rep. 6 Eq. 82.

2. The N. I. Co. gave debentures, in which, after reciting a debt due from said company to C., they covenanted to pay to "C., or to his executors, administrators, or transferees, or to the holder for the time being of this debenture bond," a certain sum; provided, that payment to the holder of the bond should discharge the company from any claim in respect thereof. *Held*, that holders of these bonds could prove in their own names, but (contrary to the decision of the Master of the Rolls) subject to all the equities between the company and C.—*In re Natal Investment Company* (*Claim of the Financial Corporation*), Law Rep. 3 Ch. 355. See *Aberaman Ironworks* v. *Wickens*, Law Rep. 5 Eq. 485, 517.

Dedication.—*See* Company, 4.

Deed.—*See* Estoppel; Way.

Delivery.—*See* Railway, 5; Sales, 2; Stoppage in Transitu.

Demise.—*See* License.

Devise.—*See* Contingent Remainder; Exoneration Illegitimate Children; Marshalling of Assets; Vested Interest; Will.

Dissolution.—*See* Partnership.

Distress.—*See* Rent Charge.

Dividend.—*See* Winding Up.

Divorce.—*See* Conflict of Laws, 1.

Domicile.—*See* Conflict of Laws.

Double Portion.—*See* Satisfaction.

Duty.—*See* Negligence, 1.

Easement.—*See* Company, 4; Way.

Ecclesiastical Law.

1. A faculty for the appropriation of a family vault under the chancel of a district church was granted by the ordinary, on the application of the proprietor of the great tithes and of the land adjoining the church, against the objections of the incumbent. The entrance to the vault was from the outside of the church, where there was no consecrated ground. *Held*, that the incumbent had, as such, a *persona standi* to oppose the grant; that, though the grant was within the discretion of the ordinary, it was his duty to prevent the possibility of misuse by the grantee, and the grant was made conditional upon the grantee's allowing a piece of ground in the vicinity of his vault to be consecrated for the sole purpose of burials in the vault, thereby preserving the jurisdiction of the ordinary, *ratione loci*, in case of any impropriety in the burial service.—*Rugg* v. *Kingsmill*, Law Rep. 2 P. C. 59; s.c. Law Rep.; 1 Adm. & Ecc. 343 (*ante*, 2 Am. Law Rev. 275).

2. The right of advowson is a temporal right of property. Although the bishop must reject an unfit presentee, his finding on the question of fitness is not conclusive, but the fact is examinable in a temporal court.

It is not, therefore, a good plea to a *quare impedit*, that the bishop had good reason to believe that the presentee had attempted to commit simony, but it must be alleged that he *had* attempted to do so, with such particularity of allegation as will enable the patron to take issue thereon.

In this case it was further pleaded, that the clerk came from a foreign diocese, and did not bring with him a sufficient testimony, from the bishop of that diocese, of his honest conversation, ability, and conformity to the ecclesiastical laws of England. It was not alleged that the clerk proved unfit, on examination, but that the production of said testimony was a condition precedent to his being examined at all. *Held*, that there was no such condition precedent. The 48th Canon of 1603 did not apply to this case, but only the 39th. Moreover, these canons do not bind the laity, *proprio vigore*, but only when declaratory of the ancient law of the Church. Neither is it enough to show that such a condition was imposed by the canon law of Europe.—*Bishop of Exeter* v. *Marshall*, Law Rep. 3 H. L. 17.

Equitable Assignment.—*See* Attachment.

Equity Pleading and Practice.

1. To a bill by a *cestui que trust* against the trustees of a testator's estate, praying for the administration of the estate, and the usual accounts and directions, and seeking to set aside a release which he alleged had been improperly obtained from him, and to be untrue in its recitals, the defendants pleaded the release by them set forth, one of the recitals of which was, that true and just accounts had been rendered, and averred the said recitals were true, and answered the rest of the bill. They did not set out the said accounts. *Held*, that the plea must stand for an answer, with liberty to except. *Quære* (per Lord Romilly, M.R.), whether a release can ever be pleaded without setting forth the accounts therein referred to.—*Brooks* v. *Sutton*, Law Rep. 5 Eq. 361.

2. A first mortgagee, having notice that A., a second mortgagee, had agreed to transfer his mortgage to B. for £250 and certain costs, and had received £250, but had not executed the transfer, made A. a defendant to a foreclosure suit. Before and just after appearing, A. told the plaintiff that he had no interest in the property, and offered to disclaim; and, being served with interrogatories, he put in an answer and disclaimer. Afterwards he executed said transfer. *Held*, that A., until he executed the transfer, was a necessary party, and that he was not entitled to his costs.—*Roberts* v. *Hughes*, Law Rep. 6 Eq. 20.

See Mortgage, 1; Patent, 1; Production of Documents; Trial by Jury; Vendor and Purchaser of Real Estate.

Estoppel.

A deed of release and indemnity to the executor of a testator contained a recital, that the executor had retained £19 8*s*., being the amount of the legacy duty on the bequests in the will, but in fact that sum was only part of such duty. *Held*, that the executor, who was afterwards called on to pay the balance of the duty, was not estopped by the above recital, made under a mistake of fact, without fraud on his part, from recovering that sum from the estate of the residuary legatees, under the covenant for indemnity in the deed.

An executor of a testator cannot renounce the executorship of other persons of whom his testator may have been executor.—*Brooke* v. *Haymes*, Law Rep. 6 Eq. 25.

See Collision; Company, 2; Specific Performance, 2.

Execution.

By 8 & 9 Vict. c. 10, § 36, "If there cannot be found sufficient whereon to levy" an execution against a company, then such execution may be issued against any of the shareholders, up to a certain limit. Where there was property of the company which had not been taken on execution, but which was not sufficient to satisfy the plaintiffs' debt, *held*, that the latter were entitled to execution against a shareholder.—*Ilfracombe Railway Co.* v. *Lord Poltimore*, Law Lep. 3 C. P. 288.

Executor and Administrator.—*See* Administration; Will, 6.

Exoneration.

In the will of one dying before 30 & 31 Vict. c. 69 came into operation, a direction, that all his debts should be paid "out of his estate," does not entitle a devisee of mortgaged land to have the mortgage debt discharged out of the residuary real estate, under Locke King's Act (17 & 18 Vict. c. 113).

By a specific devise of one of two estates comprised in the same mortgage, the other being left to pass by a residuary clause, will make the latter first liable in exoneration of the former.—*Brownson* v. *Lawrance*, Law Rep. 6 Eq. 1.

Factor.

By the Factors' Act, 5 & 6 Vict. c. 39, § 1, "Any agent who shall thereafter be intrusted with the possession of goods" may make a valid pledge of the same, although the pledgee know of the agency. A party, to whom the plaintiffs had sent wine for sale, pledged the same to the defendants after his authority had been revoked and the wine demanded of him by the plaintiffs, but wrongfully detained by him. The *bona fides* of the defendants was not questioned. *Held*, that the pledgor was not "an *agent*, nor *intrusted*, within the meaning of the act."—*Fuentes* v. *Montis*, Law Rep. 3 C. P. 268.

False Imprisonment.

Defendant, upon whose premises a felony had been committed, acting on information given him by his own coachman, the most material part of which was derived from R., a neighbor's coachman, gave the plaintiff into custody on the charge, without making any personal inquiry of R. The plaintiff was living openly in the neighborhood, and it was not suggested that he was likely to run away. In an action of false imprisonment, the judge instructed the jury, that, under the circumstances, there was no probable cause; and the verdict being for the plaintiff, the Court of Exchequer Chamber refused to disturb it.—*Perryman* v. *Lister* (Exch. Ch.), Law Rep. 3 Exch. 197.

Foreign Attachment.—*See* Attachment.

Fraud—*See* Mortgage, 1.

Frauds, Statute of.—*See* Damages, 2; Specific Performance, 4; Trust, 1.

GENERAL CORRESPONDENCE.

The duty of a Counsel to the Public and his immediate Client.

To the Editors of the Canada Law Journal.

Messrs. Editors,—The recent state trial of Whelan, at Ottawa, has brought prominently before the public the duty of an advocate to any client who may require his services. The press has very generally alluded to it, and some papers, and even meetings of Orangemen, have condemned the Honourable J. H. Cameron for taking up the defence of Whelan, on the ground of his wicked crime, as well as because he is supposed to be a Fenian. The importance of this matter has induced me to ask you to insert these extracts from Chief Justice Richards' charge, and the opening remarks of Mr. Cameron in his speech in defence of the prisoner, which bear on the question at the head of this article. I also accompany them with some remarks of my own:

Charge of Chief Justice Richards.

"His lordship wished to say a few words with regard to the position and duty of an advocate. If a professional man permitted himself to use his discretion as to what cases he would engage in, the effect would be that he would never be found in a case in which he could not gain by money or by credit. The advocate would be merchandise sold to the highest bidder. This is not the way in which the profession acts. It is the duty of every lawyer to accept every retainer; and any man, whatever his station, has a right to insist that his case be taken up. But if he takes other duties I have nothing to say—that is fair ground or public comment."

Coming, as these remarks do, from such a high authority, I am very diffident to question them. But I must say that it seems to me, after all, that a certain discretion is allowed to the advocate, otherwise not only would the feelings of the advocate be occasionally greatly outraged, but he might even be insulted if not tyrannized over by a client.

It is easy to imagine many cases where this might take place. Suppose an advocate to be distinguished for his ability, and that he has a bitter personal or political enemy. This enemy has slandered or grossly injured a personal friend, or perhaps a relative, or perhaps a society, who or which may be very dear to the advocate. The enemy of the advocate goes and insists upon retaining (perhaps happens first to retain) the advocate against his feelings—his convictions—to defend him, to sustain him in his defence in such a case. Imagine a gross libel or slander committed, or a case of seduction or *crim. con.* Imagine a brutal assault, or trespass, or fraud. Now, would the advocate not have a right to refuse to be retained against his friend, against his feelings and convictions? Take the case before us, of the murder of McGee. Suppose Sir John A. Macdonald had been out of the Government, a practising barrister, with his known friendship for the deceased,—would it be thought wrong for him to refuse to defend Whelan? Mr. Cameron is at the head of a powerful organization of men called the Orangemen. Whelan was supposed to be a Fenian, and guilty of the greatest crime (if the evidence be true) committed in Canada. Might not Mr. Cameron, taking into consideration his position, have fairly declined a retainer?

I now give a long extract from the very able and eloquent speech of Mr. Cameron on this trial:

"I have never," he said, "in the course of a long and varied experience at the bar, been called on to address a jury in any case in which I felt so much responsibility as the present. It is unquestionable that a great crime has been committed—that a great name has been blotted out from the roll of the distinguished men of the age—that a great man, who had endeavoured by his own example to get his fellow-countrymen to love that country by the institutions of which they had been enabled to acquire everything which, as free men, they can prize—has been struck down by the hand of the assassin, whilst the words of patriotism were on his lips; and the country which has shown its gratitude to his memory has demanded an atonement, and with an almost universal shout has pronounced that his murderer should be tracked and brought to justice. You can judge how far the prisoner has been entirely free from the exercise of this influence which must act in the minds of men. We all know well that the press from one end of the country to the other has been filled with comments on the course of the trial; and the manner in which, according to the rules of practice, we have been enabled to exclude witnesses from the court has been really of no value, for every day the press has been enabled to lay before the public the evidence of the day before. You will feel, therefore, that I do not speak lightly when I say that we have had to contend in this defence, not merely with the prejudice endeavoured to be got up against the prisoner at the bar, but that our efforts have had to be extended to every act connected with the case. Prisoner's counsel have been interfered with; their lives have actually been threatened for daring to defend him, and everything has been done to prejudice this man in his trial for life and death. Under these circumstances, I cannot help feeling that while a grave responsibility rests on me as a lawyer, a heavier responsibility rests on you than either the advocates or the judge in this case. Gentlemen, it has been well said that it is perfectly impossible for a man to have a fair defence unless his case can be placed before an unprejudiced jury, and it is further impossible for any one to have a free and fair defence, unless those standing in court as his advocates are allowed, fearlessly, to pursue the course which they deem best for him. It would ill become those who are considered the leaders of the bar in this country to fail in doing justice to any man placing himself in their hands. *It would ill become them to do so either through fear or favour, through the allurements or frowns of those in power.* We, as advocates, have duties to perform which we must perform fearlessly; we, as advocates, have to do our duty. I shall read to you words written and spoken by a man great in the English nation—one whose name is known all over the world. I read them to you because I desire it should go forth through the press that it does not lie in our power as advocates to refuse to defend men requiring our services. *No man's case should be prejudiced by a leading counsel refusing to take it up.* What would be the case if when the prisoner asked my services as one of those looked on as the leading counsel in Upper Canada, I had declined? *I should have been not merely a craven in my profession, but should have forgotten my duty to my God.*" (Here the learned counsel quoted from the author in question, who had laid it down that the duty in question was one which should never be given up, was one never to be given up, was one never to be influenced by public opinion. The advocate should not on these occasions mind being mixed up with the supposed criminal and the crime. He was not to retire one

step before the frowns of power, or to tremble under the dread of misrepresentation.) "That," continued the learned counsel, "is true. A man who takes upon himself the obligations of the profession to which I belong swears that he will be afraid to defend no man from fear, favour, or affection, and the justice of this practice will be apparent if you take the other side of the case, and let the prisoner be a man with a cry in his favour instead of against him—there would be no refusal to champion such a case on the part of an advocate. Why should there be so in the other case? In the present instance, too, the prisoner specially needs the services of an advocate; the entire press of the country, an instrument of immense power, and capable of doing much good, has, for a time, forgotten the glorious mission belonging to it, and, as the press has often done in other countries, has apparently endeavoured to spread a feeling against the accused instead of waiting till the trial was over before they commented on the evidence in that manner; and when you consider, gentlemen, that the prisoner has had to contend against all this, against a feeling abroad against him, even such as might influence the minds of his advocates, can we wonder that each of us in our position, you as those who hear and determine his cause and I as his advocate, should feel deeply the sense of our responsibility? It is your duty to come to the consideration of the case with your minds, and as far as you can make them, cleared from all that you have heard outside, and with your minds open to conviction. On the evidence given from day to day it is your duty to consider the case, not merely with the knowledge that the life or death of the prisoner rests on your conclusion, but that the great interests of justice are at stake. So much depends, gentlemen, on your freedom from prejudice in considering this case, that I am sure you will pardon these remarks about the relative positions of advocate and jury."

It will be seen from the above remarks that the Hon. Mr. Cameron, who is the Teasurer of the Law Society of Ontario and the acknowledged leader of the bar, takes a very strong view of the duty of an advocate; in fact, he says there is no discretion with the counsel—for if he is asked to act as the defender of any prisoner, he must accept the retainer. It matters not that his feelings and inclinations may be for the Crown, and that he may even be awaiting a retainer to prosecute (if not actually spoken to or retained), he must accept the criminal's retainer. I understand the oath of a barrister only to require him to *faithfully* and *fearlessly* advocate his client's cause *when retained, when he takes upon himself a retainer*, not that he is absolutely bound if offered a reasonable compensation for his services, to take up every defence or prosecution offered him. If he is obliged to take a retainer to defend, he is equally bound to take one to prosecute. Thus, *nolens volens*, he might be made to prosecute, to use his talents and his tongue against his oldest and best friend, or a cause or principle which he held dearer than his life! Take, for instance, a lawyer professing strict temperance principles, forced to be retained against his favourite ideas, in favour of illicit traffickers in selling liquors. Imagine a religious lawyer, retained to uphold the publication of books or newspapers, in which the truth of the Gospe of Christ is attacked.

Surely there must be a discretion allowed the advocate to refuse a retainer. I do not understand the duty of an English advocate to be stricter than was that of a Roman or Grecian advocate. Suppose Cicero, who spoke against Cataline and his wicked conspiracy against his country, had had his mouth stopped by a retainer from that man—what would the Romans have said? Suppose Demosthenes had taken up (been forced to do so) the cause of some wicked Grecian, what would his countrymen have said? Suppose an eminent American lawyer forced against his will to defend the murderer of Lincoln. Suppose Lord Brougham forced against his will to prosecute Queen Caroline at the instance of King George the Fourth. Suppose Daniel O'Connell forced by a retainer to prosecute some eminent patriot of his country.

It is thus easy *to put a case* where not only the lawyer's enlightened conscience, but his fellow men, holding high moral views of duty, would sustain him in refusing a retainer to advocate a wicked principle or defend a bad man. It may be asked, then, if all lawyers were to act on this principle, how could a defendant obtain counsel? We all know such a case is not very likely to happen. Clients can generally obtain advocates of some sort. Even admitting such a case, I yet cannot admit that the liberty of action and choice with barristers is so restricted as Mr. Cameron's words would indicate. If my view is likely to operate, in some extreme case, prejudicially to a prisoner, the other view, giving an advocate no choice to refuse a retainer, might often

much oftener, outrage an honest and virtuous lawyer's feelings.

M. D.

Toronto, 20th September, 1868.

[We do not agree with our correspondent, either in his arguments or his conclusions, but as we have already expressed our opinion on this subject, merely repeat that we entirely concur with the expressions which fell from the lips of the learned Chief Justice and the eloquent counsel for the prisoner.

We subjoin, for the information of those not familiar with it, the form of the Barrister's Oath:—"You are called to the degree of a Barrister to protect and defend the rights and interests of such of your fellow citizens as may employ you: you shall conduct all causes faithfully and to the best of your ability: you shall neglect no man's interest nor seek to destroy any man's property: you shall not be guilty of champarty or maintenances: you shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences: you shall not pervert the law to favor or prejudice any man, but in all things shall conduct yourself truly and with integrity. In fine, the Queen's interest and your fellow citizens you shall uphold and maintain according to the Constitution and law of this Province." Weighty words, truly, and not lightly to be frittered away, or weakened by mere considerations of personal feeling.—Eds. L. J.]

Law reporting—Decisions of County Judges.

To the Editors of the Canada Law Journal.

Sirs,—I find by the last number (No. 6) of the Common Pleas Reports, page 446, vol. 18, what purports to be the report of a decision of some importance to the commercial as well as the agricultural and other business men of the country, who may be affected in any way by the Insolvent Act of 1864. I do not find, however, in any part of the case, as reported, the reasons which "*the Judge of the Court below*" gave for the conclusions at which he had arrived; although the Judge who delivered the judgment in appeal says the County Court judgment was very carefully prepared, and fully sustained by the reasoning: nor do I find throughout the whole report the name of the county given in which the decision was had. The latter may be of no importance, but still it is usual to give it. But surely, when a Superior Court sustains in appeal the judgment of an Inferior Court, and the reasons are fully and satisfactorily sustained also, the Reporter might, in view of its probable importance, let the Profession know what those reasons were. He does not explain why the appeal was "*disallowed, excepting that the debtor should be allowed a further time to sustain the allegations of his petition, if he can;*" or what brought about this peculiar judgment. Nor does the judgment itself do this. The 8th paragraph, of the 447th page is a very meagre report of what I happen to know, from examining the appeal book, was a very elaborate and lengthy judgment; and if we might not have it *in extenso*, it would have been well to have given us an outline of the Judge's reasoning, because it is not improbable that the same question may be debated hereafter, either in the Court of Chancery or in the Queen's Bench, the present decision in appeal not being binding upon either of those Courts.

From all that appears in the report a stranger might infer from reading it that there is only "*one Court below*," and but one Judge of a County Court for the whole Province of Ontario.

A great deal of redundancy is made use of quite beside the question involved; for instance, although a copy of the first note is given in the 4th paragraph (page 446), the 5th paragraph tells us that the first note was payable to Luce, Brothers, or bearer, the 5th paragraph (page 447) tells us the first note was at eight per cent. generally, and the remaining notes were at eight per cent., payable annually. The 6th paragraph (page 447) tells us the first note was payable in two years, and each of the others at three, four, five, six, seven, eight and nine years. Then the 1st paragraph (page 447) tells us the dates of all six notes, and the dates of the 7th and 8th. Then the 2nd, 3rd and 4th paragraphs tells us minute particulars, which were but of the slightest importance, and if it was necessary to have given a copy of the first note, it was just as necessary to have given copies of the *other* notes; whereas a statement that none of the defendant's notes had matured, after a concise description of their amount, for all purposes of understanding the facts involved in the decision would have been quite sufficient. Or, after giving a copy of the first note, it was quite

unnecessary to say to whom or when it was payable; or its date, or its amount, or the rate at which interest was to be calculated upon its principal. Or, after giving a copy of the first note, one would have supposed that a copy of the others would have been deemed necessary too.

I am told the petition was *not* (as the Reporter alleges) dismissed by the County Judge *with* costs, but *without* costs, the question involved being new; so that, if I am correctly informed, there was here an inaccuracy, or an unnecessary statement at all events.

It is said the petition was dismissed "*as well on the law as on the merits.*" We have no report of what the merits were, except that the petition stated that the defendant's estate had not become subject to compulsory liquidation and the notes mentioned were not due. As to the merits, the Judge in appeal is made to say "*the application to have the proceedings set aside, because the* 'RESPONDENT' was not, in fact, insolvent, or amenable to the Act." Surely there is something wrong here. Who was the "*Respondent?*" Was it the party who appealed? In the Court below, and in the Act of Parliament, the debtor (or supposed insolvent person) is called a "*Defendant*," not a "*Respondent*," and he becomes by appealing the Plaintiff in appeal, or the "*Appellant*," and the Plaintiff below becomes the Defendant, or "*Respondent.*"

Then, again, it is not explained why evi dence of the facts were not given in the first instauce, so that the Court of Common Pleas ordered that proceeding to be taken afresh. The report should, I think, explain this.

Yours respectfully,

L. L. B.

Ontario, 12th Oct., 1868.

[Whatever may have been the case in former years, the Common Pleas reports have, of late, been such that a temperate criticism of a defective, or supposed defective, report may be looked upon as evidence that, as a rule, the work is now well done.

Reporting is not, as some persons imagine, the easiest thing in the world, nor is every one possessed of those qualities that, combined, make an efficient reporter. We are, therefore, disposed, for our part, to make due allowance for occasional shortcomings.

The gravamen of the complaint of our correspondent is that the judgment of the judge of the court below, which, by the way, was the County Court of the County of Elgin, was not given *in extenso*, or at least sufficient of it to give readers the benefit of the arguments adduced by the Judge of that Court.

Whilst agreeing with our correspondent that it would have been well if the Reporter had exercised his discretion in publishing, as part of the report, the judgment of the court below, because it was, as remarked by the court above, "very carefully prepared, and is *fully and satisfactorily sustained by his* (the County Judge's) *reasoning*," we cannot admit either the necessity or advisability of publishing, *as a rule*, judgments appealed from. Many judgments appealed from are intrinsically not worth reporting; others again, carefully prepared and evincing learning and research, are either upheld or reversed on grounds which are not the subject of the argument in the court below, or the appeal goes off on some point not affected by the judgment. In such cases it certainly is not the duty of the Reporters to do more than give such a general outline of the effect of the judgment as may make the report of the case case clear and intelligible—for it must be borne in mind that the Reporters are Reporters of decisions in the *Superior Courts*, and not of those in the *County Courts;* and we speak, we think, for the profession at large, when we say that the desire is not for a multiplicity of cases, simply as such, or for opinions either devoid of weight or finality, or only repeating former decisions, or affecting only a particular state of facts without the possibility of general application—but, for binding authorities, elucidating the fundamental principles of law or equity in their application either to the general business of the country, or to the interpretation of ever-recurring doubtful points under Acts of Parliament.

REVIEWS.

The Law Magazine and Law Review, August, 1868. London: Butterworths, 7 Fleet Street. Price 5*s.* a number.

The last number of this, the great English Quarterly Journal of Jurisprudence, commences, as does its *confrere* in America, with a paper on the life of Lord Brougham. The "Prospects of a Digest" are then discussed. We copy the next short article on "The Lord Chief Justice of England and Mr. Justice Blackburn," rather a memorable incident of the English Bench—also when we have space, the paper on the Judicial Committee of the Privy Council, interesting as a matter with which we have occasionally something to do and know little of, and as likely to shew some of the difficulties to be surmounted in the construction of our Court of Appeal for the Dominion.

The other articles are—The Union of Church and State—The Law of Merchant Shipping—Can a person holding a judicial office sit in the House of Commons? &c., and the usual notices of new Books.

In the Events of the Quarter we notice, amongst other "varieties," the following remarks on a subject trivial enough in itself, *Judges' Dinner*, which speaks for itself:—

"We are delighted to see this good old rule, we cannot, indeed, say kept up, (for it is not!) but reviving. We rejoice to note a remarkable instance of it; because there are few things in the legal profession better calculated to maintain a friendly feeling between the Bench and the Bar (a matter of more importance in the administration of justice than at first meets the eye,) than a convivial meeting now and then. It has many advantages of a social kind; above all, it reduces the distance between the judges and the barristers, which, in the nature of things, exists; and which, in the nature of things, will widen unless it be restrained by the constant renewal of some such reunions as this. It was, probably, to enable the judges to keep up (amongst other things) such laudable customs with a view to an harmonious intercourse, that the legislature granted such liberal salaries to the judges. There are some who seem, from their talk, to look upon their salaries in a very different light. Be that as it may, in many instances, we say it without offence, it would be difficult to find any other reason for so liberal an allowance."

The concluding remarks are, *we must admit*, singularly *mal-apropos* in this country, but it is not necessary to entertain with "a banquet of surpassing elegance," as did the "ever kind and ever generous Chief Baron Kelly," on the occasion spoken of. What we were thinking of was a much more simple matter—an inexpensive, but not therefore any the less pleasant occasional meeting in Assize Towns, where the benefits and advantages above alluded to could sometimes be participated in by the country bar as well as those going "on circuit."

The American Law Review. Boston: Little, Brown & Co., 110 Washington St., Boston. $5 00.

The October number commences with an interesting sketch of the life and times of Lord Brougham, which may be usefully read in connection with the notices of that eminent man, to be found in the English periodicals.

A large space is devoted to the discussion of the "Erie Railroad Row;" certainly a curious name for a legal article, but probably a correct one, if the reviewer is to be credited; of this we may hereafter speak more at length.

This number contains, in addition, the Digest of English Law Reports for May, June, and July, which we continue to extract for the benefit of our readers—A Selected Digest of State reports, which must be invaluable to Americans, and, considering our near proximity, often useful to us—Book Notices—A list of new law books published in England and America since July, 1868, excellent as an easy and reliable reference; and, lastly, a summary of events of professional and legal interest.

We most heartily commend these two magazines, the one English and the other American, to our brethren in Canada. The price is merely nominal, and the contents of both always excellent.

Lower Canada Reports. Quebec: George T. Cary.

Nos. 9, 10, 11 and 12, of Vol. 17, are to hand. This series of reports is edited by Messrs. J. Dunbar and G. H. La Rue, of Quebec—with Messrs. Beaudry & Robertson as contributors from Montreal.

DIARY FOR NOVEMBER.

1. SUN..21*st Sunday after Trinity.*
8. SUN..22*nd Sunday after Trinity.*
11. Wed..Last day for service for County Court.
15. SUN..23*rd Sunday after Trinity.*
16. Mon..Michaelmas Term begins.
20. Fri. ..Paper Day, Queen's Bench, New Trial Day, Common Pleas.
21. Sat. ..Paper Day, Common Pleas. New Trial Day, Queen's Bench. Declare for County Court.
22. SUN..24*th Sunday after Trinity.*
23. Mon..Paper Day, Queen's Bench, New Term Day, Common Pleas. Last day to set down for re-hearing.
24. Tues..Paper Day, Common Pleas, New Term Day, Queen's Bench.
25. Wed..Paper Day, Queen's Bench. New Term Day, Common Pleas. Appeal from Chancery Chambers, Last day for notice of re-hearing.
26. Thurs Paper Day, Common Pleas.
27. Fri. ..New Trial Day' Queen's Bench.
29. SUN..1*st Sunday in Advent.*
30. Mon..*St. Andrew.* Paper Day, Queen's Bench. New Trial Day, Common Pleas. Last day for Notice of Trial for County Court.

THE

Canada Law Journal.

NOVEMBER, 1868.

JUDICIAL CHANGES.

The vacancy caused by the retirement of the President of the Court of Appeal from the position which he had so worthily held as Chief Justice of Upper Canada (of which more hereafter), has been filled by the appointment of the Hon. William Buell Richards, formerly Chief Justice of the Common Pleas. Mr. Justice Adam Wilson goes with him as Junior Puisne, and Mr. Justice Morrison, now becomes the Senior Puisne Judge in the same court, as he is also on the Common Law Bench. Mr. Justice Hagarty is transferred from the Queen's Bench to the Common Pleas, and becomes Chief Justice of the latter Court, while Mr. Justice John Wilson takes the seat to his right; John W. Gwynne, Esquire, Queen's Counsel, being appointed the new Judge, and sitting as Junior Puisne Judge of that court.

It was at one time thought that the Chancellor would have accepted the Chief Justiceship, which was offered to him in contemplation of Mr. Draper's retirement, and it was hoped by many that he would have accepted the office, as it was very generally thought that he was admirably suited for that position, but difficulties that could not easily be surmounted in the choice of some one to succeed him in the Court of Chancery are said to have prevented his making the change.

These appointments will produce a thorough change in the *personel* of the two courts, the majority of the judges formerly in the Court of Common Pleas being transferred to the Queen's Bench, and Mr. Justice John Wilson being the only representative of the Court of Common Pleas as lately constituted. One result of this will be that the cases still standing for judgment are to be re-argued before the present bench.

As to the appointments in themselves, the Chief Justice has already presided as the Chief of a court, and the duties now devolving upon him will not be materially different from those to which he has lately been accustomed, and will, doubtless, be as faithfully performed. Of the learning and ability of the new Chief of the Pleas it is unnecessary to speak, it is admitted on all sides. We congratulate Mr. Gwynne upon his appointment, which is accepted by the profession as likely to give general satisfaction.

But while glancing at these changes we, in common with the profession at large, do so with a sense of sorrow and regret, not unmingled with certain undefined feelings of doubt as to the future, when we think that he who has of late years been the master-mind of our courts is no longer at the helm, though still in a position where he can be of signal service to his country. We trust it may not be presumptuous in us to express a hope that the example of his dignity, patience, courtesy and attentive industry will be followed by those who occupy seats he formerly filled.

The new Chief Justices were sworn in before His Excellency the Governor-General at Quebec, on the 12th inst. It certainly seems rather hard that their newly acquired dignity should subject them to such an arduous undertaking as a hurried journey to the extreme end of the Dominion. It would be bad enough to have to go to the Capital, where one might expect to find His Excellency, instead of travelling day and night by rail, a distance of a thousand miles or so. There being some doubt as to whether the Governor-General or the Lieutenant-Govenor was the proper person to administer the oaths to the Chief Justices, they were also sworn in by the latter functionary on their return from Quebec.

The Chief Justices of the respective courts on the first day of Term, in open court, administered the required oaths to Mr. Adam Wilson and Mr. Gwynne.

After this form had been completed, the Hon. J. H. Cameron, the Treasurer of the Law Society, in the absence of the Attorney-General, first, in the Queen's Bench, and afterwards in the Common Pleas, congratulated the new Chiefs upon their promotion, and Mr. Gwynne upon his appointment.

Both Chiefs when assuming their new positions in answer to the address of the Treasurer of the Law Society, referred to the good feeling, which at present exists between the Bench and the Bar, and promised to do their best to maintain it. To this end, want of patience or petulance on the part of the Bench is by all means to be avoided; and towards the attainment of the same object there must be respect and respectful demeanor to the Bench on the part of the Bar. Failing either, there will be conflicts which must result in the destruction of that good feeling which happily has hitherto existed, and which all are so anxious to maintain.

CRIMINAL PROCEDURE.

The questions raised by the counsel for the prisoner Whelan at his trial at the Ottawa assizes will it is supposed be brought before the Court of Queen's Bench during the present term.

The criminal law seems to require that where a prisoner convicted of a felony obtains a writ of error, he must be personally present in court when error is assigned, during the argument, and when judgment is delivered.

This rule, of some practical use to prisoners perhaps a hundred years ago, can scarcely be said to be so now, when every criminal can obtain counsel, or counsel is assigned to him by the merciful practice of our law; and it is open to serious objections, some of which present themselves in a case like the present. The prisoner has to travel from the extreme end of the Province at some expense to the county, and from the nature of things, is afforded opportunities of escape, which would not offer themselves under other circumstances. The danger is the more apparent when the possibility of a rescue by the friends of the prisoner is taken into consideration, and this possibility becomes more or less probable according to the ease of accomplishment, and will necessary be greater in proportion to the time occupied in the transit of the prisoner from one place to another, and other circumstances. The chances will be increased when the crime partakes of a political character, or in times of great political excitement. We may here remark that it is now rather the rule than the exception, that the presence of prisoners is dispensed with on the return of writs of *habeas corpus* to test the legality of their imprisonment.

Another thing worthy of comment in our criminal law practice is the curious fact, that although a debtor cannot be committed to close custody for a week, for the non-payment of a dollar a month, pursuant to the order of a Division Court Judge, nor a man sent to jail for ten days, or fined ten shillings and costs by a justice of the peace for vagrancy without being called upon to shew cause to the contrary, and after a formal order duly signed and recorded—a man may be convicted of murder and hanged accordingly, without the scratch of a pen to order the execution. Some judges certainly have occasionally relieved the mind of a timorous sheriff by writing opposite the name of the criminal the words *Sus. per col.*, but this is seldom done we believe in practice, and some judges have refused to do even this.

The answer to this is, we suppose, that a record *can* be made up, if required, at any time, and so it may, if the evidence for the purpose has been preserved—but the fact remains the same, nevertheless, though we do not at present know of any case where this curious absence of what is a mere matter of routine in the most trifling cases has worked any injustice.

Proceedings in error in criminal cases being rather out of the common, it may satisfy the curiosity of some, in view of the *cause celebrè* about to come before the Queen's Bench, to give a short sketch of the *modus operandi*.

The writ of error to the court of Oyer and Terminer of the proper county is obtained on the fiat of the Attorney-General, returnable we presume in either court. The return sets forth the proceedings of the court below in full. Upon the return day of this writ, the prisoner, the plaintiff in error who has to be brought before the court by a writ of *habeas corpus ad subjiciendum*, prays oyer of

the writ and return, and the same having been read, leave is craved to assign error on part of the prisoner, which being granted, the reasons of error are entered on the record, and issue is joined in error on behalf of our lady the Queen. The prisoner then by himself or by counsel prays that counsel may be assigned to him, which being done, a rule for the purpose is drawn up, though in practice this is generally dispensed with. The counsel so appointed then prays for a *concilium*, which the court appoints for a day certain in term.

The prisoner after judgment is pronounced is ordered to be re-delivered to the custody of the sheriff of the county in which he was found guilty—either to suffer the penalty inflicted by the original sentence of the court of Oyer and Terminer, or to await the result of an award of *venire de novo*.

NEW LAW BOOKS.

We understand it is the intention of Mr. Leith, as soon as the consent of Mr. Williams can be obtained for the purpose, to publish an edition of "Williams on Real Property," adapted to the Law of Ontario. If this consent can be obtained, the work will appear in three months. The publication of this edition will be of great benefit to students, and will in this country practically supersede the English editions, and we should strongly reccommend those who have to buy the book to wait until Mr. Leith has published his volume.

Mr. Taylor has his annotations on the new Chancery orders in a forward state, and it will we understand, soon be out of the printers hands, and be ready for delivery inside of a month.

LAW SOCIETY—MICHAELMAS TERM, 1868.

CALLS TO THE BAR.

Mr. Bernard Devlin and Mr. Wright, of the Lower Canada Bar, were called to the Bar of Ontario on the first day of Term.

The following gentlemen, having passed the necessary examinations, were also called to the bar, out of twenty-two who presented themselves:—A. J. Christie, Ottawa; Alex. Dunbar, Stratford; W. R. Chamberlain, Napanee (all without oral); John Muir, Hamilton; J. H. T. Bleasdell, Belleville; Jas. Cartwright, Kingston; James O'Loane, Stratford; John McLean, St. Thomas; Fred'k Biscoe, Guelph; W. H. C. Meyer, Seaforth; William Milloy, Toronto; Jas. E. Robertson, Toronto; John W. Douglas, Perth; — Whitley, Toronto; John H. Scott and Edm'd J. Beaty, Cobourg.

ATTORNEYS ADMITTED.

Of twenty-one gentlemen who went up for examination, only the following have as yet succeeded in passing:—W. M. Merritt, St. Thomas; J. H. Macdonald, Toronto; Seth S. Smith, Port Hope; W. F. Medcalf, Picton; A. J. Christie, Ottawa; Wm. Milloy, Toronto, and W. H. C. Meyer, Seaforth.

None of these were required to undergo the oral test. The remainder answered the *vivâ voce* questions of the Benchers so indifferently that they could not be allowed to pass; they are, however, to have another chance on a future day this Term. Those who have been before that awe-inspiring body known as the Benchers for oral examination, will bear witness to the exceeding fairness and courtesy with which they are treated by the Treasurer and those of the Bench who may happen to be present, and cannot but say that every opportunity is given to students to answer the questions put, and that without any fear of their misunderstanding them, and in such a way as, so far as possible, to prevent any nervousness on the part of the students.

Mr. R. C. Henderson, who, we understand, passed an excellent written examination, could not, however, be admitted this Term, owing to some defect in his articles.

LAW SCHOLARSHIPS.

The Examinations resulted as follows:—

First Year—Maximum of marks, 320: R. M. Fleming, 294.

Second Year—Maximum of marks, 320: John Crerar, 245.

Third Year—Maximum of marks, 320: Dan'l Wade (scholarship), 314; H. J. Muckle, 284; Wm. Green, 281; Sam'l Clarke, 274.

Fourth Year—Maximum of marks, 360: Charles Moss, 291.

The answering in the third year appears to have been remarkably good.

The first of the intermediate examinations, under the new rules of the Society, has also taken place, and was, we are informed, most creditable to the gentlemen who passed.

SELECTIONS.

THE FALLACY OF LOCAL TRIBUNALS.

If the wisdom of the social Science Association were to be measured by its discussion on 'the reorganisation of our Courts, superior and local,' the interest in its proceedings would speedily be limited to those who are charmed with the sound of their own voices. To say nothing new, and to say that little badly, is less than could be expected even from the boldest usurpers of the title of *savans*. Yet the only sense on perusing the speeches delivered at Birmingham on the condition of our judicature is one of entire disappointment. To plead as they do in Chaneery, to fuse law and equity, and to substitue local for central jurisdiction, are the specifics discovered by the doctrinaires of the Association. The first two propositions are good enough, but they are not new; the last is neither good nor new. It is, as we believe, an idea thoroughly considered and completely discarded by the Judicature Commission, scarcely at this date to be galvanised into a *post-mortem* activity by the most ardent and juvenile of advocates. Yet, as it has been seriously and elaborately recommended in Section B, and not combated by any subsequent debater at the meetings of the Association, it behoves us to say a few words on this proposition.

It is advanced, first, that the plaintiff should be allowed to begin his action in any local court, whatever may be the nature or amount of his claim. Second, that if the claim be below 500*l*., then the plaintiff should be compelled to begin in some local Court. On the other hand, the defendant may post an affidavit to the registrar of the local Court stating that he has a good defence and a good cause for removal. The plaintiff may reply, opposing the removal, by a counter affidavit. This is certainly a pleasant prospect to start with. A., living in Northumberland, receives a summons from the County Court of Cornwall for a demand amounting to some hundreds of pounds. Being a prudent man, he necessarily would not be content with posting an affidavit to the registrar stating an inclination to have his cause tried in London or at Newcastle, but would be driven to employ an attorney at Bodmin to watch the proceedings. The summons is also to contain in all cases a clear warning that, unless the defendant, within six clear days of the hearing, gives notice to the registrar of his intention to defend, with a statement of the grounds on which he rests his defence, the plaintiff shall be at liberty to have judgment entered up against the defendant. At present a summons must be served ten clear days before the day of hearing. The consequence is that, according to this plan, within the space of four days A. would have to find an attorney—his own resident in London, for example—and, through that attorney, to take counsel's opinion as to the grounds of his defence, to get an affidavit drawn and sworn, and to transmit all these documents in due form to Bodmin, under pain of having judgment entered up against him. The post would take two days, so that this marvellous feat would demand accomplishment in about 48 hours.

Such a scheme is so monstrous, that, if the language was not explicit, it would be only fair to suppose that grave misapprehension existed as to the meaning of the speaker. At present, if the proceedings are in the County Court, the defendont has this advantage, that the plaintiff must come into the defendant's own district; but here the words are: 'The plaintiff should have the option of suing in whatever local Court he thought fit, not being compelled to follow his debtor to any distance;' just as though to 'snap' a judgment was altogether about the most just and delightful thing known to all the legal world. If a man is sued now in the superior Courts, he has eight days to appear; then he has the breathing time afforded before delivery of the declaration; then eight days to plead, with further time as a matter of course. In most cases a defendant gets some three or four weeks in which he may prepare to meet the demand made against him. But that sort of delay is no longer to be allowed, and the defendants are to be tomahawked and scalped within four days from the service of the summons. We can almost discern in the gloom the twinkle of the eye of the tallyman at this charming proposition. But it goes beyond petty debts and the petty oppression of petty creditors, and defendants are to be fixed with judgments and executions, we suppose with proportionate rapidity, for amounts not exceeding 500*l*. Indeed, that seems to be the limit only of compulsory jurisdiction, so that it may be that the judgment may run up to thousands or even millions, unless the local judge of his own mere motion interfere for the purpose of transferring the cause to a superior Court.

We have criticised these items of the general proposition to localise the administration of justice, not so much because they go in any way to the root or principle of the thing, but rather to show how crude, unpractical, and absurd are the views which have been thus put forward. It is impossible for an association to repress persons who insist on reading papers in the several sections, but the mischief is that a fictitious importance is lent to such documents by the prestige of the society. The public, naturally unable to form as sound a judgment on the reform of the adminstration of law as on broad questions of policy, is apt to imagine that there is a virtue in the legal quackery which loudly asserts its own excellence, and that the real authorities, the staff of judges and heads of the profession, are mere adherents of a species of priestcraft. But the principle of localising justice in this country is unsound, the moment that it is carried beyond the speedy means of recovering petty debts,

remedying small grievances, and resolving rights of trifling import. In the present day communication with London is a matter of the utmost facility, and procedure by writ or other notification issued out of offices in the metropolis is at once the most inexpensive and most rapid method of getting the litigant parties together. Every day that diminishes the use of writs brings home to the attorneys a stronger sense of the convenience attached to that ancient system of commencing actions. The main point as against the localisation of Courts is that in proportion as you localise the administration of law, you lessen justice. Local law and bad law are convertible terms. Law is a thing not acquired once for all, as if it were an instrument warranted never to get out of order, but it is a science of unceasing developement. Let the most learned and most acute of judges be taken from Westminster Hall and planted in a County Court, and in ten years he will sink below the least able of the brethren over whom he once towered. The reason why a man elevated to the Bench in Westminster Hall does not decline in knowledge, energy, and power is because the endless attrition of other intellects keeps his mind bright. Take away that instrument, and he rusts. The County Court judge has no chance. He has no Bar before him to keep up his education; he has no means, except through reports which he has little leisure and less inclination to master, of keeping himself *au courant* with the historical changes of the law, which are hourly effected by judicial decisions. It is difficult to measure the extent to which the tendencies of public opinion, the march of scientific, theoretical and moral inquiry, operate on the minds of judges and lawyers, and so by an imperceptible but steady process influence the law. All this is lost upon the local judge. By no human possibility can he get beyond the point of excellence which he had reached at the moment of his appointment. But by the great law of nature, which compels movement in one direction or another, he as surely retrogrades. As a rule, too, unless he is a remarkable man, not only his legal power but his moral nature suffers, as does the nature of all men whom circumstances have placed in isolated superiority to those with whom they have to deal. These are the common causes which go to create the complaints, neither indistinct nor unintelligible, as to the conduct of County Court judges. The system is at fault, not the men, who work well for nine-tenths of the objects for which they were appointed, but fail in the tenth, and so rise against themselves a clamour disproportionate to the real greivance. But now it is demanded that their ju.isdiction shall be extended immeasurably, with the certain result that the outcry against them will find substantial justification, and that a formidable reaction will set in, so soon as the wealthier classes begin to feel where the shoe pinches.

The moment that men of landed estate, of large commercial interests, and of great social standing, experience in their own affairs what it is to have important issues of law and fact decided by the local tribunals, it will go hard with the whole institution. It is precisely because it is desirable to preserve what is of real value in the County Courts that it is a duty to save them from their friends.

These objections, we are glad to perceive, had occurred, though in a very slender degree, to the mind that advanced the great theory of local Courts. Therefore it was proposed that the judicial staff should be increased, and that four times in the year a sort of County Courts Quarter Sessions should be held, at which some three or four judges of the adjoining districts might meet, and hold sittings in banco, and also try issues in fact reserved specially for these meetings. This scheme is fair enough, and might be adopted in some form or other with advantage at the present moment. It is certainly rather vain labour to move a judge to rescind his own ruling on a point of law, and his own finding on an issue of fact, and some plan of making such motions before a Court composed of three or four judges might well be adopted. So also there would be a chance of getting a few counsel to attend on such occasions, to the benefit of the Bench and of the suitors. But it is impossibe to suppose that this balm of Gilead will suffice to heal all the diseases existing or to be engendered in the local tribunals.

Another argument which has found weight in some quarters apparently offers considerable attractions to the gentleman whose views, as expressed at Birmingham, we have endeavoured to explain and to combat. It is said that County Courts and these new quarterly Courts would be a sort of training ground for young advocates. Possibly persons whose breath would be taken away by confrontation with a Middlesex jury and a judge of the Court of Queen's Bench may control their nerves before a County Court judge. But how an arena in which bad law and indifferent manners are not absolutely unknown is to fit an advocate for more exalted struggles it is hard to see. The way to learn law and advocacy is to listen to the ablest counsel, and to note what falls from the ablest judges, and little or nothing is gained by acquiring a confidence which only makes a man rush in where angels fear to tread. There is another point not to be lightly dismissed. It is now pretty well admitted, and was very strongly put amid loud cheering at the meeting of the Bar last spring, that the petty rules and restrictions appertaining to practice on circuit might well be thrown overboard as useless cargo.

How did the ship of the profession ever come to be freighted with the burden? Because each circuit assumed to itself the airs of a petty corporation, in which the members acted on the grand principle of mutual jealousy and suspicion. Just as though all were rogues eager to circumvent their neighbours, and so had to be checked by a code of stringent regu-

lations. So sprang up the notion of protecting one circuit as against another, of protecting elder members as against the juniors, and of protecting all from the contamination of attorneys. All this system is now decaying with such rapidity that it is wholly unnecessary to employ active means for its rapid annihilation. But the notice of local Bars attending local Courts is not only a child of the same family with the aged monster, but is infected by graver vices. What was formerly only felt twice a year and alleviated by the purer air of London practice, is now sought to be made perpetual without the means of finding any alternative. Multiplicity of practice, of traditions, even of law, would be hard to endure, but their mischief would be small in comparison with the gigantic evil of local Bars with a variety of rules of miscalled etiquette, and a host of precedents of conduct of questionable propriety.

There is yet a stand-point for our adversaries They may point to France and to America. In the United States the Constitution rendered localisation of justice necessary, but not in the sense used in this country. Every State of the Union is sovereign—is, so to speak, for all purposes of internal economy, an Empire, and enjoys its own particular system of jurisprudence. Each State, therefore, must of necessity have its own judges and its own lawyers. The example of France serves the turn no better. Considering the very great ability and eloquence of the French Bar, any man must be struck with its want of power and position in the State. The first Emperor could afford to despise and insult the profession, and the existing Government takes no heed whatever of it in calculating the forces of friends and foes. The French Bar cannot furnish a member to the Bench; it even occupies a position of weak antagonism both to the Bench and the Executive. There may be many reasons for this state of things. But the great reason is that the Bar is not one homogeneous and consolidated body, able to concentrate its power in a given direction, but is split up by a system of local centres of justice into a number of associations. In England the Bar is an united body, and this fact is the chief element of its great and growing strength.—*Law Journal.*

STATISTICS OF THE DIVORCE COURT.

If the Frenchman who believes that one of the eccentric peculiarities of Englishmen is the sale of their wives at Smithfield Market when they prove intractable were to air his curiosity in the Divorce Court at Westminster, he would probably after a few hours of attentive listening to the proceedings of the Court be satisfied that a much better mode had been discovered of settling matrimonial disputes in England. It might also dawn upon him that English wives are not wholly passive in the transaction, though how far they are active as petitioners to the Court the Blue-book renders no information. Of the whole of the official returns these are the most meagre—indeed they are so defective as to be wholly valueless for the ordinary objects of statistics. The total number of petitions for judicial separation and for dissolution of marriage is given, but whether the petitioners were the husbands or the wives it has not been thought proper to state. However, we must bear these omissions and also many discrepancies philosophically, and accept what we can get. The number of proceedings for 1867 and for the previous year, as well as an average for the seven preceeding years, 1859–65 inclusive, have been given. A certain though slight improvement is perceivable in the business of the Court from year to year. In 1867, there were 321 petitions filed against 306 in the previous year, which shows an increase of 6 when compared with the average for the seven years. We will, before going further, proceed to analyse, as far as possible, the total for the former year. It will be needless to refer to the others, as each particular item of one year is merely an echo of the previous year. The petitions for dissolution of marriage in 1867, then, were 224, on which 119 decrees were made; for judicial separation 70, on which 11 decrees were made; and for the restitution of conjugal rights only 15. Entire dissolution of the Gordian knot, as revealed by these figures, is preferable to the mockery of a judicial separation. Innumerable private reasons of course may exist in many instances to urge the latter form of disunion, but it is well known that some of those who pursue the former plan, immediately on being cured thrust their fingers again into the fire, and not unfrequently discover that they have once more been burnt. There were 9 petitions filed for nullity of marriage, 1 for declaratory act, and 2 *in formâ pauperis*, which make up the total of 321. The remainder of the business of the Court shows a proportionate increase; for example, the number of petitions for alimony was in 1867, 95; in the preceding year 86; and 77 was the average for the seven years. In the former year 466 citations were issued, and 676 summonses. The number of causes actually tried was 159 in 1867, of which number 127 were tried before the Judge-Ordinary on oral evidence, and the remainder before him and juries; 183 in 1867; and 231 is given as the usual average. Judgment was delivered by the Judge-Ordinary in the whole of the 159 cases brought to trial during last year, from which only 4 appeals were made to the full Court, and the absence of any to the House of Lords is remarkable. The revenue of the Court, like its business, experiences a small variation, but there is a decrease in that for 1867 on every year. The statements stand thus:—In 1867 the sum of 2,512*l.* 16*s.* was the amount of fees actually received, against 2,596*l.* 13*s.* in the previous year, and 2,582*l.* is given as the average of the amounts for the seven preceding years.—*Law Journal.*

THE PRACTICE AND PAYMENT OF CONVEYANCING.

It is rather the habit of the present day to complain of the small fees payable to conveyancers, and of the invaders with which the Profession is troubled in the shape of auctioneers and accountants. In Canada, however, it appears that they are far worse off than we are; for a correspondent of the *Canada Law Journal* tells us in its last number that not only is the regular conveyancer narrowly watched in his professional conduct, and especially in the investigation of titles, but the unhappy fraternity has been almost entirely ousted from their legitimate sphere. "Schoolmasters, magistrates, clerks of division courts, and (until the Act of last session) registrars, Members of Parliament, township officers, and some others have monopolised the principal part of the coveyancing business in this country."

It is urged by the same writer that there should be a known and uniform standard of charges for lawyers such, in fact, as prevails amongst solicitors in this country; and we adduce this evidence to caution the Profession here against too earnestly desiring the *quantum meruit* system. There being no regular scale in Canada, a person who wants law work done goes from firm to firm until he gets the lowest tender. We do not conceive that such a plan would ever succeed in England, and it is as well at once to disabuse the mind of the public as to strengthen in opposition to it the feeling of the Profession. The *quantum meruit* might be well applied to conveyancing, but if it goes so far it is clear it should not be allowed to go farther.—*Exchange.*

RIGHTS OF WOMEN UNDER THE REFORM ACT.

The Hon. George Denman, Q. C. has addressed to a lady his views upon this vexed question He says:

I think it a very doubtful point. As the Bill was originally drawn, I have a strong opinion that it would have given the franchise to women (not married). It contained a clause saying that certain classes of "men" should be enfranchised, and in enumerating those classes, enumerated one of them as "every man who (being a male person) shall be," but that clause (the fancy franchise clause) was struck out. The matter now stands as follows: The Act gives the vote to "every man" who, &c., not being under any legal incapacity. The word "man" was not used in the Act of 1832 (2 & 3 Will. 4). but the words "male person." By 13 & 14 Vict. c. 21, s 4, it is provided that "words importing the masculine gender shall be deemed to include females (in all future Acts of Parliament), unless there is something to the contrary in the Act itself." It is argued, on the one hand, that the words "not being under any legal capacity" are words to the contrary of "man" being held to include "woman;" on the other, that those words merely refer to "minority," "marriage," and such-like incapacities. There is this in favour of your view (and it may have been intended in high quarters), viz., that when I put the question to Mr. Disraeil, whether it was intended, he gave me an evasive answer; and when Mr. Mill proposed the word "person" instead of "man," he (Mr. Disraeil) abstained from voting: but that the House did not mean it is clear, from the faet that we who voted for it were in a considerable minority. With this, however, no judge has any thing to do. It is a pure question of law, and I think, a very arguable one as it stands.—*Exchange.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-law, Reporter to the Court.)*

Forbes v. McClelland.

Slander—Application to plead several matters—Justification.

In an action of slander the plea of not guilty puts in issue the defamatory sense imputed to the words alleged to have been spoken.

A plea of justification seeking to justify the use of the words in a sense different to that imputed will not be allowed.

A general plea of justification will.

[Chambers, Sept. 17, 1868.]

This was an action of slander. The declaration contained four counts. The first count alleged that the plaintiff carried on the business of buying and selling cattle, and that the defendant falsely and maliciously spoke and published of the plaintiff in relation to the said business and the carrying on and conducting thereof by me, the following words "Beware of these Highland rogues, they will cheat you if they can, and don't allow your cow to go out of the field until they pay you, for they have cheated me out of nine dollars for a cow," whereby the plaintiff was greatly injured in his good name, credit and reputation, and in his said trade and business.

The 2nd count. That on the 5th June, 1868, the plaintiff personally appeared before Alexander MacNabb, Police Magistrate of the City of Toronto, and laid an information and complaint before him, as such Police Magistrate as aforesaid, upon her oath duly taken and administered by and before the said Magistrate against the defendant, charging him upon oath that he did, in the City of Toronto, on the 4th June, 1868, use grossly insulting language to her, the plaintiff, on the public streets of the said City of Toronto, an offence against a by-law of the said city, and over which the said Magistrate had jurisdiction to enquire and to take the said information, &c., and the plaintiff having been sworn, &c., the Magistrate issued his summons therein against the defendant, and the defendant after the laying of the said information and complaint as aforesaid, and after swearing to the truth thereof, as aforesaid, by the plaintiff, and before the commencement, &c., falsely and ma-

liciously spoke and published of the plaintiff, and of and concerning the said information and complaint, the words following "He swore falsely before you, meaning thereby that the plaintiff committed wilful and corrupt perjury in swearing to the truth of the said information and complaint under oath.

The 3rd count. In that the defendant, &c., the words following "he swore false in Court," meaning that the plaintiff had committed wilful and corrupt perjury in swearing to the truth of the said information and complaint in the said 2nd count mentioned.

The 4th count. For that the defendant, &c., falsely and maliciously spoke and published of the plaintiff, the words "She has perjured herself."

The defendant obtained a summons calling upon the plaintiff to show cause why any two of the last three counts should not be struck out, on the ground that they were based on identically the same cause of actions, and for leave to plead to the whole declaration "not guilty," and for a second plea to the first count "that the plaintiff did not carry on the business of buying and selling cattle as in said first count alleged," and for a second plea to the 2nd, 3rd and 4th count, or such one of them as might remain a plea "that in speaking and publishing the words in the said second, third and fourth counts respectively charged, the defendant meant that the plaintiff, in the information referred to in the said second count, had sworn to what was untrue in fact, and the defendant was understood by all persons to whom the said words were spoken and published so to mean and not otherwise or further, and the defendant saith that in the said information sworn to before the Police Magistrate of the City of Toronto, as in the said second count mentioned, the plaintiff deposed that the defendant, on the fourth day of June, 1868, used grossly insulting language to her, the plaintiff, on the public streets of the City of Toronto, and the defendant further saith that the alleged language referred to in the said information, as used by the defendant to the plaintiff, was not so used on any of the public streets of the said City of Toronto, as therein sworn to by her, the plaintiff, but on the contrary thereof the only language used by the defendant to the plaintiff, on the occasion referred to in said information, was so used in a pasture field at some distance from any street of the said city; and so the defendant saith that it was and is true that the plaintiff, in the said information, had sworn to what was untrue in fact."

McKenzie, Q. C., shewed cause and cited *Earl of Lucan* v. *Smith*, 26 L. J. Ex. 94; *Devlin* v. *Moylan*, 4 Prac. Rep. 150.

The following authorities were cited in support of the summons: *Watkin* v. *Hall*, L. R. 8, Q. B., 402; *Barretto* v. *Pirie*, 26 U. C. Q. B. 468.

Draper, C. J.—The defendant asks leave to plead to the second, third and fourth counts, to the effect following: that the plaintiff hath laid an information on oath before the Police Magistrate of the City of Toronto, that he had (in violation of a by-law of the city) used grossly insulting language to her on the public streets of the city. That in fact he had not used such language in the public streets, but only in a field at a distance from any street. That he only meant and was understood to mean that she had sworn to a matter untrue in fact, and that the plaintiff had thus sworn to a matter which was untrue in fact, *i. e.*, as regarded the place *where* he had used grossly insulting language to the plaintiff.

As regards this plea it admits, as to the second count, that he did say to the Police Magistrate "she swore falsely before you," and as to the third count, "she swore false in court," and as to the fourth count, "she has perjured herself."

Now it is competent to the defendant, on the general issue, to prove that the words were not spoken maliciously, or in the defamatory sense imputed, or in any defamatory sense which the words themselves impart, and therefore, as to the fourth count, all that according to the plea is wanted to be proved, refers to the use of the word "perjured" in a defamatory sense, while as to the words in the second and third counts, in each of which the words are by inuendo stated to charge wilful and corrupt perjury, the question arises different in its terms but leading to the same result.

The plaintiff's information, according to the second count, charged defendant with an offence against a city by-law, *viz.*, using grossly insulting language to the plaintiff on the public streets of the City of Toronto. It will be observed that to constitute this offence there are two requisites. 1st. The use of insulting language. 2nd. In a particular place, to wit, the public streets. Plaintiff therefore must be taken to have sworn to both, or the charge could not have been entertained, the Police Magistrate having no jurisdiction. If she did so swear, then the plea says it was "untrue in fact," and that defendant meant that the plaintiff in this information had sworn to what was untrue in fact, and was so understood to mean by those to whom he used the words stated in these counts, and not otherwise or further, and he asserts that she did swear to the use of insulting language in the public streets, but that he used no such language in the public streets, but in a pasture field at some distance from any street. It will be observed that the defendant does not deny in words that he meant to charge her with wilful and corrupt perjury, he only says he meant that her information was untrue in fact" and "not otherwise or further." But the assertion, as she made it, was material,—of the essence of that which gave the Magistrate jurisdiction, without which there could be no offence committed against the by-law. The natural meaning of the charge of false swearing in an information before a Magistrate would be that perjury had been committed by the accuser, if the fact sworn to were material and indispensable to the charge, and that sustains the inuendo while the plea denies the inuendo, while it asserts the falsehood of the information; it amounts to this "The plaintiff falsely swore to the existence of a material fact in charging me with an offence. I have said she swore falsely and I re-assert it, but I did not mean that she committed perjury, she only swore to what was untrue in fact." If this means anything it is a denial of the defamatory sense imputed to the

words, and may be proved under not guilty. I do not, therefore, allow this plea.

His Lordship also refused to strike out any of the counts on the ground that the plaintiff was entitled to a separate count for each utterance of the alleged slander attempted on the same occasion.

The defendant then applied for leave to plead the general plea of justification to the 2nd and 3rd counts which was allowed.

Order accordingly.

SOWDEN ET AL., EXECUTORS, v. SOWDEN.

Particulars—Special Endorsement—Declaration.

A plaintiff is not limited in his declaration to the particulars of his cause of action specially endorsed on his writ of summons.

[Chambers, October 2, 1868.]

A. H. Meyers, for defendant, applied for a summons to set aside the declaration, copy and service, and notice to plead and service on the ground that the declaration contained counts on causes of action other than those stated in the special endorsement on the writ of summons, citing *Fromant* v. *Ashley*, 1 E. & B., 723, 22 L. J., N. S., Q. B. 237.

The writ in this case was specially endorsed. 1st. For $180, being 18 months interest on a covenant contained in a mortgage to testator for $2,000 (describing the mortgage). 2nd. $300 on a promissory note, dated 4th May, 1863, made by one I., payable to the order of defendant and endorsed by him to testator. 3rd. $55.74, being cost of a certain suit (particularly designated) paid by testator.

The declaration served contained five counts.

1st. For two years interest on the sum of $2,000, mentioned in the covenant stated in the special endorsement, accruing in the life-time of the testator.

2nd. For one year's interest on the same covenant, accruing since the testator's death.

3rd. On a promissory note, dated 4th May, 1863, made by W. E. J., payable to defendant, or order, for $300, and endorsed by defendant to testator.

4th. On a promissory note, dated 11th August, 1863, made by W. E. J., payable to defendant, or order, for $300, and endorsed by defendant to testator.

5th. Common counts on causes of action accruing to testator.

To this declaration are attached particulars of demand on the common counts:—

Costs of suit, Sowden against testator, in his lifetime, and the defendant, on his promissory notes, declared upon in the third count	$55 74
Fees paid to the Sheriff of the United Counties of Northumberland and Durham on making the money on execution in said suit	20 00
Interest on said sums from January, 1864,	20 00

DRAPER, C. J.—The C. L. P. Act authorizes a plaintiff, in all cases where defendant resides within the jurisdiction of the court, and the claim is for a debt or liquidated demand in money, arising on a contract, such as a promissory note or a bond or contract under seal for payment of a liquidated sum, to make a special endorsement of the particulars of his claim, which endorsement shall be considered as particulars of demand, and no further or other particulars of demand *need be* delivered unless ordered by a Court or Judge.

Unless to the common counts no particulars need have been delivered with this declaration: *Brooks* v. *Fallar*, 5 Dowl., 361; *Dawes* v. *Anstruther*, 5 Dowl., 738. This is the general rule, though not without special exceptions.

But in this case the defendant asks to set aside the declaration, copy and service, and notice to plead and service—because the declaration contains counts on causes of action not stated in the special endorsement, and in support of this application he relies on the 15th sec. of the C. L. P. Act. (Con. Stat. U. C., ch. 22.), which is like the 25th sec. of the C. L. P. Act of 1852, in England, and on the case of *Fromant* v. *Ashley*, 1 E. & B. 723. That case did not decide anything at all with reference to the declaration, nor indeed as to the delivery of fresh particulars, though it may be inferred that the court would have held that where the writ had been specially endorsed the plaintiff could not, without leave of a Judge, have delivered fresh particulars.

But the present application appears to go the length of asserting that if an action is brought and the writ of summons is specially endorsed, the plaintiff cannot declare for any other cause of action than that refered to in such endorsement.

I do not find any case so determining; *Fromant* v. *Ashley* certainly does not go that length, nor indeed relate to the declaration at all.

No doubt if the defendant had not appeared to this writ the plaintiff need not have declared, but might have signed judgment, at once, for any sum *not exceeding the sum* endorsed on the writ, and at the expiration of eight days from the last day for appearance might issue execution. Then the special endorsement would have bound him.

But the 15th section of the Act contemplates that, notwithstanding the special endorsement, no further particulars need be delivered unless ordered by a court or a judge.

The plaintiff need not, under the 2nd and 4th counts, have delivered particulars, nor do I think further particulars would have been ordered on the application of the defendant, simply because those counts state all that particulars need to state.

There appears to me to be neither reason nor justice in giving such an effect to the statute. I cannot think the Legislature meant to say to a plaintiff, if you endorse your writ specially, and, by the defendant appearing to contest your claim you are compelled to declare, you must declare only for what is stated in your special endorsement, and if you have any other demand which was due to you from the defendant when you began your action, you must begin another action to recover it, or lose it altogether.

I refuse the summons.

Summons refused.

Hood v. Cronkrite.

"Change of venue—Application for, before appearance on affidavit of a person describing himself as "attorney for defendant in this cause."

An application for a change of venue before appearance entered is irregular.

Before appearance entered, a defendant has no attorney *in the cause*, and an affidavit made by a person calling himself such was therefore *held* insufficient to support an application for a change of venue.

Semble, that the statement of addition as to the name of a deponent is only descriptive, and is not an allegation of a fact.

[Chambers, October 2, 1868.]

This was a summons to change the venue from the County of York to the County of Halton, on an affidavit made by R. S. A., "attorney for the above named defendant," who stated:—

That the declaration was filed on the 28rd September, 1868, laying the venue in the County of York:

That defendant had a good defence on the merits:

That the cause of action arose in the County of Halton and not in the County of York, or elsewhere, &c.

That it will be necessary to subpœna at least ten witnesses who are material and necessary, and that nearly all of them reside (nine out of ten) in the County of Halton.

The estimated difference of expense was $40.

In reply to this the plaintiff swore that no appearance was entered, and that declaration had to be served personally, and had been filed and served:

That he means to subpœna eleven witnesses, whose names he gives, and states they are material; almost all residing in the City of Toronto, and none in the County of Halton, and it was objected to the affidavit filed on the part of the defendant to support the application that the deponent described himself as defendant's attorney when no appearance had been entered.

Draper, C. J.—The C. L. P. Act provides for plaintiff proceeding and declaring, though no appearance be entered. See sec. 56 of Con. Stat. U. C. cap. 22, sec. 61 of original act.

Under the old practice it would seem that the affidavit to change might be made either by the defendant or his attorney. The case of *Biddell* v. *Smith*, 2 Dowl. 219, rather leads to the conclusion that if the defendant be in the Province he should make the affidavit. The affidavit of a defendant's wife was held sufficient, provided he was too unwell to make an affidavit, and she understood the nature and particulars of the action, but Parke B said "the defendant or his attorney" is the proper person: *Williams* v. *Higges*, 8 Dowl., 165. In the report in 6 M. & W. 183, Parke B. says: the proper person to make the affidavit, under the circumstances, (*i. e.*, defendant being unable from illness to make it) is the *plaintiff's* attorney. The application was to bring back—not to change the venue as stated in 8 Dowl.

In the present case no appearance whatever has been entered. By what right does defendant make this affidavit? There are things he may apply for before appearance, though, as a general rule, he must appear before he can take a step in the cause. *Ex. gr.* he may get an order for particulars of demand, or an order to stay proceedings on payment of debt and costs, or to compel plaintiff's attorney to disclose plaintiff's residence. But I find no case in which an application to change the venue has been entertained before appearance. It does not appear to me that he has a right to treat the plaintiff's declaration as an equivalent for his (defendant's) appearing because the plaintiff is authorized by a special provision in the act to take this course. Before the C. L. P. Act he might have entered common bail, or an appearance for defendant, if the latter made default. That, he cannot now do.

But, though an application to change the venue may be made on the common affidavit *before* issue joined, it cannot be made after plea, while on special grounds it should not, as a rule, be made until after issue joined. There is nothing shown to justify the special application before issue in this case.

There being no appearance, the defendant has no attorney *in this cause*, no one on whom service could be made to bind him, nor do I think that he has an attorney who can swear for him, especially when he has actual knowledge of the facts, or most of them, sworn to, while the affidavit produced is on instruction, information and belief. The statement of addition as to the name of the deponent is merely descriptive, it is not an allegation of a fact.

I discharge this summons with costs, on the ground that no sufficient affidavit is filed to sustain it, and I am inclined to think the application irregular because made before appearance entered.

Summons discharged with costs.

Corrigan v. Doyle.

Time to declare where long vacation intervenes—Time for taking next step after plaintiff's summons with stay of proceedings discharged.

Where the plaintiff obtains a summons with stay of proceedings, which is afterwards discharged, he has not the same time for taking the next step in the cause as he had when the stay arose, but must take it on the same day the summons is discharged, or obtain further time, and the practice in this respect is the same both as regards plaintiffs and defendants.

Where the defendant has given the plaintiff notice to declare, the latter has no further time to do so in consequence of some of the eight days falling in vacation, the rule of Court No. 9 and sec. 83 of C. L. P. Act, applying only to pleadings after declaration.

[Chambers, October 13, 1868.]

The facts of this case were as follows:—On the 18th June, 1868, the defendant served the plaintiff with notice to declare in eight days pursuant to C. L. P. Act sec. 82.

On the 18th June the plaintiff obtained a summons to extend the time for declaring until the 22nd August, which was enlarged from time to time, with stay of proceedings, until the 28th July, when it was discharged with costs. On the 29th July the defendant signed judgment of *non pros.*

W. Sidney Smith obtained a summons calling on the defendant to shew cause why the judgment and all proceedings should not be set aside for irregularity, with costs, on the grounds, that it was signed too soon, and before the plaintiff's time for declaring had expired: that the plaintiff had the same time to declare after his summons for further time was discharged, as he had when it was returnable, and as he could

not declare in vacation, that he had until the end of vacation in which to do so.

Osler shewed cause. The stay of proceedings applies only to the adverse proceedings of the other side, and the summons having been discharged the plaintiff was compelled to take the next step in the cause on the same day, or obtain further time to do so: *Mengens* v. *Perry*, 15 M. & W., 587; *Vernon* v. *Hodgins*, 1 M. & W., 152; *St. Hanlaire* v. *Byam*, 4 B. & C., 970; *Hughes* v. *Walden*, 5 B. & C., 770; Ch. Prac., 12 Edn., 224, 1591.

The plaintiff had no further time to declare, in consequence of the last day falling in vacation. The statute and rule of court apply only to pleadings after declaration: *Reg. Gen.* No. 9; C. L. P. Act, sec. 83.

Smith, contra. The plaintiff had the same time to declare after the summons was discharged as he had when it was returnable; the rule as to taking the next step on the day it was discharged applied only to the case of a defendant; at all events, as the last day for declaring, according to the defendant's own admission fell in vacation when it was impossible for the plaintiff to declare regularly, he necessarily had until the end of vacation in which to do so: *Crooks* v. *Dickson*, 10 U. C. L. J. 158; *Ryley* v. *Parmenter*, 2 U. C. L. J. N. S., 268; Arch. Prac. 12 Ed. 1591, 1602; *Mengens* v. *Perry*, 15 M. & W. 587; *Wood* v. *Nichols et al.*, 8 U. C. L. J., N. S., 205; *Abbott* v. *Hopper*, 8 Dowl. 19; *Trego* v. *Tatham*, 9 Dowl. 879.

Morrison J.—I am of opinion that this application must be discharged. It appears that on the 13th June last the defendant gave the plaintiff the usual notice requiring the plaintiff to declare within eight days, otherwise judgment of *non pros.* On the 18th June the plaintiff obtained a summons for further time to declare until the 22nd August. On the return of the summons on the 19th it was enlarged, and was subsequently enlarged by both parties until the 28th July, when it was discharged with costs, proceedings during the enlargements being stayed. At the time the application was made the time for declaring would expire on the 21st of June. On the 29th July, the day after the summons was discharged, the defendant signed judgment. The plaintiff contends that this judgment is irregular, upon the ground that, in effect, when it was signed the time to declare had not expired; that as the plaintiff had two days' time when his summons was granted, he had at least such two days after it was disposed of, and as it was disposed of in vacation, he had until the second day after the 21st August to declare; in other words, he contends that whether his application was granted or dismissed, as it was, with costs, he obtained the time, or rather one day more than the time he asked for. With respect to the stay of proceedings during the pendency of the application, and upon which Mr. Smith, for the plaintiff, rested a good deal of his argument, cases may arise in which a stay may apply to the proceedings of both plaintiff and defendant, but I take it as a general rule that it only applies to the adverse proceedings of the plaintiff or defendant, as the case may be, and whose proceedings it is the object of the applicant to stay or prevent. Here the plaintiff obtained the summons, and the proceeding to be stayed was the entering a judgment of *non pros.* by the defendant so soon as the eight days expired, and the stay could only be applicable to that proceeding. The summons was discharged with costs after the time for declaring had elapsed, and if the plaintiff was entitled to any time to declare, it would be only the whole of the day on which the summons was discharged: *Mengens* v. *Perry*, 15 M. & W. 538. The defendant entered his judgment of *non pros.* the day after the application was dismissed, and it was not contended that the defendant could not sign the judgment in vacation. Under these circumstances, as the plaintiff had disenabled himself, through his own application to file a declaration on the day the summons was discharged, it being in vacation, he ought to have applied to the learned Judge for relief, but I may assume, as the Judge dismissed with costs his application, asking for time until the day after vacation, that he would not have relieved the plaintiff, for, in that case, he would only, in another way, be granting to the plaintiff his original application. I do not think that the plaintiff should be permitted to profit by his own improper application for time, and through it obtain all that he asked, although it was discharged, as already stated. He was not entitled to be, with respect to time, as said by Bayley, J., in *St. Hanlaire* v. *Byam*, 4 B. & C. 970, in a better condition by reason of his own rule improperly obtained.

Summons discharged with costs.

INSOLVENCY.

IN THE COUNTY COURT OF THE COUNTY OF NORFOLK.

In the matter of Lyman F. Langs, an Insolvent.

Insolvency—Composition and discharge—Unnecessary for creditors to prove debts to enable them to execute deed of—Schedules conclusive—Confirmation refused.

[Simcoe, October 28th, 1868.]

This was an application to confirm the discharge of the insolvent under a deed of composition and discharge.

Tisdale for the insolvent.

Ansley for the non-releasing creditors.

The facts of the case fully appear in the judgment of

Wilson, Co. J.—By a deed of assignment bearing date the 22nd day of August, 1867, made under the Insolvent Act of 1864, the insolvent voluntarily assigned his estate to A. J. Donly, the official assignee for the County of Norfolk. Annexed to the deed of assignment is a schedule of creditors of the insolvent, and the amount of his indebtedness to them individually, duly sworn to by him. Amongst other scheduled creditors appeared the names of Leonard Sovereign, John and Eliabim Langs, and Charles Lyons, to whom, as appeared by the schedule, the insolvent was indebted as follows:—

To Leonard Sovereign, for	Rent	$445 00
" " "	Note	250 00
" " "	Do.....	75 00
		$770 00

To John and Eliakim Langs, on judgment assigned 200 00
To Charles Lyons, loan 15 00

The total amount of the indebtedness shown by the schedule is $3,328 98.

At the foot of the schedule was a list of the insolvent's assets, comprising 150 bushels of barley (unthreshed), 80 bushels of wheat (unthreshed), 100 bushels of oats, three quarters of an acre of potatoes (in the ground), 6 acres of growing corn, 4 acres of buckwheat, half an acre of turnips, and 5 tons of hay. From an examination of the insolvent on the 31st August last, it appeared that the barley yielded 227 bushels, worth 80 cents per bushel; that the three quarters of an acre of potatoes yielded from 80 to 100 bushels, worth 40 cents per bushel; that the half acre of turnips yielded 80 bushels; that the hay was worth $10 per ton, but that the buckwheat was a failure; that he also had at the time of the assignment a span of horses worth $120, which were not mentioned in the schedule; and that he had since raised and acquired the following property, viz.: 200 bushels wheat, worth $1.87 per bushel, 6 acres of corn, 5 tons of hay, 6 acres of oats (unthreshed, probable yield 120 bushels,) 125 bushels of barley, sold at 93 cents per bushel, 2 acres of beans, 1 cow worth $20, 8 spring calves worth $6, 6 hogs worth $10, and half an acre of potatoes; and that no part of this property has been handed over to the assignee, although demanded.

At the time of the assignment, John and Eliakim Langs appeared to have had an execution in the hands of the sheriff against the goods of the insolvent, upon which the sheriff, on the 5th of October, 1867, made the sum of $176.90. At the same time the sheriff appears to have paid Leonard Sovereign the sum of $828, on account of a claim made by him for rent. These two payments appeared to have exhausted the greater portion, if not the whole of the assets mentioned in the schedule. The goods comprising these assets appeared to have been divided between the execution creditors and the landlord, who are near relatives of the insolvent, and were left in his possession.

From the evidence of the insolvent it is questionable whether Sovereign was entitled to any sum at the time for rent. The insolvent states that he took a written lease from Sovereign last April. That there was a verbal lease made between them about April, 1867, the terms of which were that he should occupy Sovereign's farm and give him a fair equivalent for it, which he considers would be $100 for last year. At that examination the insolvent stated that he had sold a portion of the produce raised this year, for which he received $287.53, $50 of which he had then in hand, and the balance he had paid out in expenses and necessaries for his family. He appears to have paid Charles Lyons, one of his creditors, (willingly or unwillingly,) the amount of his claim in full.

By a deed of composition and discharge made under the act, bearing equal date with the assignment, but executed subsequently, a majority of the creditors of the insolvent, and representing scheduled debts to the amount of $2,572, in consideration of the nominal sum of 5*s*, released and discharged the insolvent from all liability. It is expressed in the deed that the several creditors executing it release the insolvent from all debts, claims and demands due to them from him, "and set opposite to their respective names" at the foot of the said deed. The amounts set opposite to their respective names correspond exactly with the amounts mentioned in the schedule as being due to them. Assuming the liabilities of the insolvent to be correctly stated in the schedule and release, the former at $3,328.98, and the latter at $2,572, the creditors joining in the discharge represent a sufficient amount and are sufficient in number to bind the remainder of the creditors.

It is objected by Mr. *Ansley*, on behalf of the non-releasing creditors, that until creditors have proved their claims before the assignee, as directed by sub-sec. 4 of sec. 11 of the act, they cannot rank upon the estate or bind other creditors by their acts.

Mr. *Ansley* also contends that the claims of certain creditors who have been paid either in part or in full, (viz., Sovereign, John and E. Langs, and C. Lyons,) who discharge, and whose claims are estimated at the full schedule amounts, should be reduced by the amount paid them, which would reduce the total amount of the debts of the discharging creditors to $2,063, which is less than three-fourths of the whole amount of the insolvent's indebtedness.

Mr. *Tisdale*, on the other hand, contends that it is not necessary for creditors to prove their debts in order to execute a discharge. And further, with regard to the payments made to the creditors above mentioned, that the evidence only shows that certain payments were made, but not that they reduced the indebtedness mentioned in the schedule, and he puts in affidavits of John and E. Langs to show that the actual indebtedness of the insolvent to them was $699.93, $499.93 more than the amount mentioned in the schedule.

Neither of these learned gentlemen produce authorities bearing upon the points raised, but appear to rely upon their interpretation of the statute. It appears that neither L. Sovereign, John and E. Langs, or Charles Lyons, proved their claims before the assignee. It has been stated that some of the creditors have proved their claims, but there is no evidence of this fact before me, and I do not think the omission of any consequence, as I am of the opinion that it is not necessary for creditors to prove their debts to enable them legally to execute the deed of composition and discharge.

In the absence of proof to the contrary, the amounts mentioned in the schedule and sworn to by the insolvent must, I think, be taken to be correct, and I feel that I have no discretion in this case, but must be governed by the schedules in computing the numbers and amounts of the debts of creditors necessary to execute the discharge. Sub-sec. 13 of sec. 5 directs how debts shall be proved under the act. No other method is given. I am clearly of the opinion that I have no power to adjudicate upon the claims of John and E. Langs, and that the amount of their claim cannot be increased by affidavit filed upon the application to me for a confirmation of the discharge. My jurisdiction

in such cases seems to be simply appellate. See *In re Cleghorn*, 2 U. C. L. J., N. S., 133; *Re Stevenson*, 1 U. C. L. J, N. S., 52.

The payments to Sovereign, Langs and Lyons are admitted. These payments must, in my opinion, be applied in reduction of the schedule debts, and being applied in that way will reduce the amount of the debts of the discharging credi. tors to a sum less than the amount required to effect the insolvent's discharge.

Taking this view of the case, it is unnecessary for me to enter into the question of the insolvent's conduct in retaining and dealing with the estate as disclosed in his examination, nor how far the same may have tended to bring him within the provisions of sub-sec. 6 of sec. 9.

Confirmation refused.

UNITED STATES REPORTS.

SUPREME COURT OF VERMONT.

McDaniels, Executor, &c. v. McDaniels.

Conversations had with jurors about the case on trial by the friends of the prevailing party, intended and calculated to influence the verdict, constitute a sufficient cause to warrant the court in granting a new trial, even though not shown to have influenced the verdict in point of fact, and though they were had without the procurement or knowledge of the prevailing party, and listened to by the jurors without understanding that they were guilty of misconduct in so doing.

A motion for a new trial, upon the ground of misconduct by jurors during the trial, need not contain an averment that the misconduct was unknown to the moving party before the jury retired, It would seem to be otherwise when the objection to the juror is some matter which existed before the trial commenced, and which might have been a cause for challenge.

The fact that the moving party neglected to inform the court, before the jury retired, of misconduct on the part of jurors during the trial which came to his knowledge, would not, if proved, necessarily, as a matter of law, defeat the motion for a new trial, but would be one circumstance to be considered with others by the court in determining whether, in their discretion, to set aside the verdict.

Appeal from the probate of an instrument purporting to be the last will and testament of James McDaniels, deceased. The case was tried by jury, at the September Term of the Rutland County Court, A. D. 1866, upon the issue joined upon the plea, that the instrument is not the last will and testament of the decease l, and a verdict was rendered for the proponent. After verdict, and before judgment, a motion was filed by the defendant to set aside the verdict for several causes, among which was the following: "For that some of the panel of jurors, after they were impannelled, and during the progress of the trial, and out of court, were talked to and with, upon the subject of said cause, and favorably to the proponent, by the agents, emissaries, and friends of Isaac McDaniels, and by them were urged and solicited, and influenced by improper conversations with said jurors, or in their presence, to render a verdict in favor of the proponent." This motion was supported by accompanying affidavits. Further testimony was taken and filed by both parties, and at an adjourned session of the County Court, Peck, J., presiding, the verdict was set aside for the cause above assigned,—to which decision the proponent excepted. The exceptions were allowed, subject to the opinion of the Supreme Court whether exceptions will lie in such a case. The exceptions set forth that the court found that the conversations detailed in the affidavits were had with, and in the presence of the jurors who tried the cause, during the trial, and that several of the persons holding such conversations, were the friends of the proponent, and that they held such conversations for the purpose of influencing the verdict of the jury in his favor; that this was dode without the procurement of either the proponent or the defendant, and without the knowledge of the proponent. And the court did not find that it was done with the knowledge of the defendant. It was also found that the conversations were of a character directly calculated to influence the verdict in favor of the proponent.

The court did not find any corruption, or intentional misconduct in any of the jurors, but did find that some of the jurors were guilty of impropriety in suffering conversations to be held with them, and in their presence and hearing.

The counsel for the proponent contended that the court could net legally set aside the verdict; and particularly because it was not set forth in the motion, nor in the affidavits sustaining the same, that the defendant had no knowledge of the conversations when they occurred, and before the jury retired to consider the verdict. But the court held this not to be in law essential.

E. Edgerton and *Daniel Roberts*, for the plaintiff.—1. As a general proposition, it may be said, that the setting aside of a verdict, and the granting of a new trial, rests in the discretion of the County Court, to which no exception lies. But this discretion is not unrestrained license. It is limited by legal principles and legal rules. It depends, both as to its exercise at all, and, in a degree, as to the mode of its exercise, upon the facts found. So far as the decision below can be resolved into a legal conclusion from the facts found and stated upon the record, it is subject to revision: *Joyal* v. *Barney*, 20 Vt. 159-160; *Briggs* v. *Georgia*, 15 Id. 61; *French* v. *Smith et al*, 4 Id. 363.

2. The court reports, that the conversations referred to "were of a character directly calculated to influence the verdict in favor of the plaintiff," but does not find that the verdict was thus influenced; that there was no "corruption nor intentional misconduct in any of the jurors;" and that those conversations were had "without the procurement of the plaintiff, and without his knowledge." Courts will not visit the consequences of an irregularity upon an unoffending party, unless it appear that it has wrought some injury to the other party: *Dennison* v. *Powers*, 35 Vt. 39; *Downer* v. *Baxter*, 30 Id. 467; *Blaine* v. *Chambers*, 1 S. & R. 169; 2 Grah. & Wat. N. T. 309, 310, 312, 317; *Shea* v. *Lawrence*, 1 Allen 167.

3. This was not a proper case for the exercise of any discretionary action of the court, inasmuch as it must be assumed that the defendant knew of the matters complained of, at the time of their occurrence, and did not bring them to the knowledge of the court before the verdict, but lay quiet, speculating upon the chance of a verdict in his favor.

On this point the case states the non-finding of the court. "The court did not find that it

was done with the knowledge of the defendant"—thus distinguishing between this and the positive finding in respect to the plaintiff's knowledge.

Clearly the tendency of the testimony was to prove this knowledge on the part of the defendant.

But to warrant setting aside the verdict, it should be both stated in the motion and be proved affirmatively, that the defendant did not know of the matter complained of before the rendition of the verdict: *Brunshill* v. *Giles*, 9 Bing. 18; *Herbert* v. *Shaw*, 11 Mod. 118; *State* v. *Camp*, 28 Vt. 551; *Jameson* v. *Androscoggin Railroad*, 52 Me. 412; *Pettibone* v. *Phelps, et al.*, 18 Conn. 445; *Selleck* v. *Sugar Hollow T. Co.*, Id. 452; *Woodruff* v. *Richardson*, 20 Id. 237; 2 Grah. & Wat. N. Trials 803, 575.

Charles C. Dewey and *A. Potter*, for the defendant.—I. Exceptions will not lie, and the case should be remanded.

a. The court found the fact that the persons guilty of tampering were the friends of the proponent.

b. That the conversations were of a character directly calculated to influence the verdict of the jury in favor of the proponent.

c. That they were held for the purpose of influencing the verdict of the jury in his favor.

d. That the jurors were guilty of impropriety in suffering such conversations with them, and in their presence and hearing.

e. And that the conversations were in violation of law.

II. As a motion for a new trial, for causes *dehors* the record, is and must be addressed to the discretion of the court, the decision cannot be revised on exceptions, unless, indeed, it be for the improper admission or rejection of evidence, or when it is apparent the decision is based upon a false legal assumption: *Sheldon* v. *Perkins*, 37 Vt. 557; *Shea* v. *Lawrence*, 1 Allen 169; *White* v. *Wood*, 8 Cush. 415; 2 Grah. & Wat. 47, n. 4.

It has never been held, or even claimed, that jurors' depositions may not be received to prove the misconduct of the parties or of persons acting in their behalf: *Ritchie* v. *Halbrooke*, 7 S & R. 458

III. 1. It is not essential that the tampering be done by the party himself, nor by his procurement. It is sufficient if it be done by his friends and in his behalf: *Deacon* v. *Shreve*, 2 Zab. 176; *Coster* v. *Merest*, 8 Brod. & Bing. 272; *Knight* v. *Freeport*, 13 Mass. 218; *Shea* v. *Lawrence*, 1 Allen 169; *Brunson* v. *Graham*, 2 Yeates 166; Pleas of the Crown, vol. 2, p. 308; Grah. & Wat. vol. 2, p. 298, *et seq.*

2. And even if the attempt to bias the jury be made by strangers, the verdict will be set aside if there is fair ground for belief that it has been influenced thereby: Grah. & Wat. vol. 2, p. 309.

3. So, in the class of very numerous cases, where papers have been delivered to the jury by mere mistake, the verdicts have been set aside, whenever the papers had any tendency to bias them: *Whitney* v. *Whitman*, 6 Mass. 405; Vin. Abr., *Trial*, pl. 18; *Hix* v. *Drury*, 5 Pick. 296; *Sargent* v. *Roberts*, 1 Id. 337.

4. The same rule obtains, and verdicts will be set aside: 1. Where jurors are allowed to separate before a verdict is agreed upon, if the separation is attended with the slightest suspicion of abuse: *Oliver* v. *Trustees of Pres. Church*, 5 Cow. 283; *Horton* v. *Horton*, 2 Id. 589. 2. Where a juror gives private information to his fellows, material to the issue, which may have influenced them: *Sam* v. *The State*, 1 Tenn. 61. 3. Where jurors re-examine witnesses who have already testified: *Metcalf* v. *Dean*, 2 Bay 94; *Perine* v. *Van Note*, 1 South. 146; *Bedington* v. *Southall*, 4 Price 282.

It thus appears from the authorities above cited, and many others to be found in the books, that the ground upon which courts set aside verdicts for improper attempts to influence the jury, is not merely and only the misconduct of the party, but the possibility that the unlawful attempt, by whomsoever made, or with whatever motive, may have inoculated the verdict with vice or error.

IV. 1. It is a corollary of the preceding proposition, already incidentally discussed, that it need not affirmatively appear that the verdict was injuriously affected by the tampering. If the purity of the verdict might have been affected, it will be set aside. And this rule has been adhered to with great rigor and tenacity: *Whitney* v. *Whitman*, 6 Mass. 405; *Cohen v. Robert*, 1 Strab. 410; *Perkins* v. *Knight*, 4 N. H. 474; *Hare* v. *The State*, 8 How. (Miss) 187; *Com.* v. *Roby*, 12 Pick. 496; *Com.* v. *Wormley*, 8 Grat. 712; *Custer* v. *Merest*, 8 Brod. & Bing. 272; *Knight* v. *Freeport*, 13 Mass. 218; Gra. & Wat. vol. 2, p. 800; *Hix* v. *Drury*, 5 Pick. 286.

The opinion of the court was delivered by

Steele, J.—The motion for a new trial was properly granted. It was not incumbent upon the moving party to show that the verdict was, in point of fact, influenced by the unlawful conversations. It is quite enough that, in a doubtful case, conversations with the jurors have been had during the progress of the trial for the purpose of influencing and directly calculated to influence them to render just the verdict they did. There is no practicable method to so analyze the mental operations of the jurors as to determine whether, in point of fact, the verdict would have been the same if the trial had been conducted, as both parties had a right to expect, according to law and upon the evidence in court. If the court, in their instructions to the jury, err, with respect to some proposition of law, it is well understood that the right of the defeated party, on exceptions to a new trial, does not depend on his showing that the error actually influenced the verdict. It is enough, if its natural tendency is to influence the jury to render their verdict against him, and such may reasonably have been its result. The right to a correct charge from the court is no more sacred or important than the right which, in this case, was violated. The analogy might be carried farther. It is not essential to the right to a new trial, on exceptions, that the error of the court should have been intentional, or by the fault of the prevailing party. So, in this case, the defendant was not any the less likely to be injured because the jurors did not appreciate the impropriety of tamely listening to conversations intended to influence them, or because the plaintiff was unaware of the officious efforts of his friends on his behalf. The friends of the plain-

tiff who thus approached the jury were guilty of a flagrant violation of the law, and the jurors who suffered themselves to be so approached, though they may have meant no wrong, were guilty, not only of a violation of the law, but also of the oath which they had taken to say nothing to any person about the business and matters in their charge but to their fellow jurors, and to suffer no one to speak to them about the same but in court. Both were liable to severe and summary punishment. The plaintiff, as he was unaware of these transactions, is not liable to punishment, but it does not follow from this that he can hold a verdict which is the result of a trial corrupted, though without his fault, by a shameful disregard of the familiar rules which are necessary to a decent administration of the law. The court set the verdict aside, not as a punishment to any one, but in justice to themselves, as well as to the defendant, that the trial may be conducted fairly, so that the verdict, when finally rendered, may be entitled to the respect of both parties and the confidence of the court as the result of a trial substantially according to law, and upon the evidence in court. It is true that a verdict should not be set aside for every trifling error of law by the court, or for every trifling misconduct of a juror which occurs without the fault of the prevailing party, but it should be whenever the error or misconduct renders it reasonably doubtful whether the verdict has been legitimately procured.

The plaintiff insists that the motion is fatally defective because it contains no allegation that the defendant had not full knowledge of the matters complained of before the jury retired to consider their verdict, and that this is a defect which cannot be cured by proof, and that, even if it could, it has not been in this case, the court merely stating in the exceptions that they did not find that the misconduct occurred *with* the knowledge of the defendant, and not stating that they did find that it occurred *without* his knowledge. We do not think these objections are well taken. It was not incumbent upon the moving party to either allege or prove that he had not such knowledge. If the other party could prove that he had, or if he could prove that he had not, it would be one fact to be considered, with others, by the court in determining whether, in their discretion, to grant the motion, but the circumstance that the moving party had such knowledge would not, as a matter of law, defeat the motion. The case is clearly and broadly distinguishable, both in reason and authority, from those in which the objection to the juror is some matter that existed before the trial. If an objection to a juror exists when the jury are impannelled, the juror may be challenged and another substituted, and if a party knowing the objection neglects to challenge, he thereby expresses his satisfaction with the juror. But where the objection arises from misconduct of the juror during the trial, the opportunity for challenge has passed. Another juror cannot then be substituted and a fair trial thereby secured. If the juror is dismissed it but results in what is asked for here—a new trial. A party ought usually to suggest to the court any serious misconduct of the jurors of which he has positive knowledge, or entirely reliable information, particularly if learned early in the trial, as it *may* result in an immediate discharge of the jury, and a saving of much time and expense. But the fact of the misconduct may be denied, and a court cannot always interrupt a trial to investigate charges against a juror, and must exercise very great caution and discretion to be able to even make inquiries of the jurors with relation to their conduct in such a manner as to create in their minds no feeling of resentment toward either party. We cannot hold that the failure of the party, if proved, to make the suggestion to the court, would be more than a circumstance to be considered and weighed, with others, by the court in determining whether, in their discretion, to grant a new trial.

It is very true that in two Connecticut cases it has been held that it is necessary for the party to aver in his motion his ignorance, until after the jury retired, of the misconduct which occurred during the trial. But the latter of these two cases, *Woodruff* v. *Richardson*, 20 Conn. 241, professes to be governed by the earlier, *Pettibone* v. *Phelps*, 18 Conn. 452; and in *Pettibone* v. *Phelps*, the court, after stating several very good reasons why the motion should be denied, merely add, a point not made by counsel, that the motion is also insufficient for the reason that it contains no allegation that the misconduct of the juror was unknown to the plaintiffs before the trial closed, and that it was settled in *Selleck* v. *The Sugar Hollow Turnpike Co.*, 18 Com. 453, that such an allegation was essential. It thus seems that this doctrine, in Connecticut, originally rests solely upon the authority of *Selleck* v. *The Sugar Hollow Turnpike Co.* Upon examination of that case, it turns out that the objection there taken was not at all misconduct by a juror during the trial, but was a disqualification which existed before the trial, in that the talesman was not an elector in Connecticut, but a citizen of New York; and the court hold that if the party knew the fact at the trial he might have challenged the juror provided he did not choose to waive the disqualification, and that he should have alleged that he did not know it in order to excuse his not making the objection seasonably and regularly. It is clear, therefore, that this case is no authority to warrant the decisions which professedly rest upon it.

The views which we have expressed are decisive of the matter before us, and it becomes unimportant to discuss the other questions presented. In the opinion of the court, this case presents a state of facts in which the court below, in the exercise of their discretion, not only might, without error, but ought to have granted a new trial, and the exceptions to the action of the court in so doing are overruled and the cause is remanded.—*Am. Law. Reg.* 729.

To constitute the crime of bigamy, there must be a valid marriage subsisting at the time of the second marriage. A marriage between slaves was, in legal contemplation, absolutely void; but if the parties, after their manumission, continued to cohabit together as husband and wife, it was a legal assent and ratification of the marriage; and if, while such marriage exists, one of the parties marries another, it is bigamy.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE AND JULY, 1868.

(Continued from page 267.)

Garnishee.—*See* Attachment.

Gaming.

Surrounding the inclosure of the grand stand for the Doncaster races was a strip of land, itself inclosed by a paling. Within this strip were placed temporary wooden structures with desks, at which were clerks. A man outside conducted the business of betting, and the clerks recorded the bets. *Held*, that such a structure was an "office" and a "place," within 16 & 17 Vic. cap. 119, sec. 3, making penal the keeping of such.—*Shaw* v. *Morley*, Law Rep. 3 Exch. 137.

Highway.—*See* Way.

Illegitimate Children.

A testator, who had none but illegitimate children, left his property in trust, to divide the residue into four parts, and to hold one share each, on certain trusts, for each of his four children; and if the trusts should fail as to the share of either child, then the same was to be held for such persons as would be the next of kin of said child at his decease, under the Statute of Distributions. There were further trusts as to moneys to which a child should become entitled, "by virtue of the provisions hereinbefore contained, as next of kin of the others, or other, of them." The trusts failed as to one child. *Held*, that there was an intestacy as to that share. The words "next of kin" could not be read as designating the surviving illigitimate children of the testator.—*In re Standley's Estate*, Law Rep. 5 Eq. 303.

Income.—*See* Vested Interest.

Indemnity.—*See* Specific Performance, 1.

Indorsement.—*See* Bills and Notes.

Infant.—*See* Contributory, 2.

Injunction.—*See* Company, 2, 3; Patent, 1; Trial by Jury; Vendor and Purchaser of Real Estate.

Insanity.—*See* Lunatic.

Insurance.

A ship then at Calcutta was insured for three months from and after thirty days after her arrival there, and valued at £8,000. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have exceeded its value when repaired. During the continuance of the risk, the ship was totally lost. *Held*, that the policy attached, notwithstanding the previous injury to the ship, and that, there being no fraud, the valuation of the ship in the policy was conclusive between the parties.—*Barker* v. *Janson*, Law Rep. 3 C.P. 303.

Interest.—*See* Account; Vested Interest.

Judge.

Plea to a declaration for slander, that the defendant was a county court judge, and the words complained of were spoken by him in his capacity as such judge, while sitting in his court, and trying a cause in which the present plaintiff was defendant. Replication, that the said words were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not *bona fide* in the discharge of the defendant's duty as judge, and were wholly irrelevant in reference to the matter before him. *Held*, that the action could not be maintained.—*Scott* v. *Stansfield*, Law Rep. 3 Exch. 220.

Jurisdiction.—*See* Admiralty; Vendor and Purchaser of Real Estate.

Laches.—*See* Specific Performance, 4.

Larceny.

1. The prisoner, having paid a florin to the prosecutrix for purchases, asked her afterwards to give him a shilling for change, which he put upon the counter. She put a shilling down, when the prisoner said to her, "You may as well give me the two-shilling piece and take it all." She then put down the florin, and the prisoner took it up. She took up her shilling, and the change for it put down by the prisoner, and was putting them into the drawer, when she saw she had but one shilling of the prisoner's money. But as she was about to speak, the prisoner's confederate drew her attention, and both left the shop. *Held*, that the prisoner was guilty of larceny.—*The Queen* v. *McKale*, Law Rep. 1 C. C. 125.

2. The prisoner found a sovereign on a highway; believing it to have been accidentally lost, and with a knowledge that he was doing wrong, he at once determined to keep it, notwithstanding the owner should afterwards become known to him, but not expecting that the owner would. *Held*, on the authority of *Reg.* v. *Thurborn* (1 Den. C. C. 387; 18 L. J. M.C. 140), that the prisoner was not guilty of larceny.—*The Queen* v. *Glyde*, Law Rep. 1 C. C. 739.

Lease.—*See* Winding up, 1.

Legacy.

Bequest of personal estate to unborn issue for life, with an ultimate limitation to the exe-

cutors, administrators and assigns of the survivor of the said unborn issue, gives an absolute interest to the survivor, and is not too remote. *Avern* v. *Lloyd*, Law Rep. 5 Ch. 383.

See Ademption; Illegitimate Children; Marshalling of Assets; Satisfaction; Vested Interest; Will.

License.

"We do grant to W. liberty and license to fasten" a coal hulk to certain moorings, until one month's notice be given. W. "to pay towards the expenses of placing and maintaining and repairing the moorings," £30 per ann. *Held*, to be a license, not a demise, and hence that W. was not liable to be rated as occupier. *Watkins* v. *Overseers of Milton-next-Gravesend*, Law Rep. 3 Q. B. 350.

Lien.—*See* Vendor and Purchaser of Real Estate.

Limitations, Statute of.

1. Trustees, under an act of Parliament, made a road, fifty years before this suit, separated from a field by a hedge, a bank, and a ditch three feet wide, adjoining the field. This ditch became filled up, and was never re-opened; but a ditch a foot wide had been made since by the tenant of the field, and it had also become obliterated. The hedge had always been included in the lease of the field, and the tenants had always trimmed the same at their own expense, testified that they had "held and used" the land within the same for more than twenty years (though apparently only by allowing their cattle to drink out of the ditch when open, and graze over its site when filled up), without the interference of the trustees. *Held*, there was no such adverse user as to give the owners of the land a title to the site of the ditch by the Statute of Limitations.—*Searby* v. *Tottenham Railway Co.*, Law Rep. 5 Eq. 409.

2. A cheque is not an advance until it has been paid, and the Statute of Limitations only runs from that time.—*Garden* v. *Bruce*, Law Rep. 3 C. P. 300.

3. The analogy of the Statute of Limitations cannot be set up by an executor, in answer to a claim founded on a breach of trust by his testator.—*Brittlebank* v. *Goodwin*, Law Rep. 5 Eq. 545.

See Trust, 2, 3.

Locus Pœnitentiæ.—*See* Company, 1.

Lunatic.

A committee of the person of a lunatic had received an allowance of a certain sum a year for the maintenance of the lunatic, and another sum for the maintenance of her children, and swore that, after properly maintaining the lunatic, he had spent the remainder of her allowance on the maintenance of her children. *Held*, that he would not be ordered to account on the petition of the children.—*In re French*, Law Rep. 3 Ch. 317.

See Ademption.

Marriage.—*See* Conflict of Laws, 1; Nullity of Marriage.

Marshalling of Assets.

A testator left £2,000 to plaintiff, and devised the residue of his real estate to the defendant. The personal estate was insufficient to pay debts and legacies. *Held* (reversing the decision of Kindersley, V. C.), that the plaintiff had not a right of marshalling as against defendant, in consequence of the Wills Act, but that both should contribute ratably.—*Heusman* v. *Fryer*, Law Rep. 3 Ch. 420; s.c. Law Rep. 2 Eq. 627 (*ante*, 1 Am. Law Rev. 516).

See Power.

Master and Servant.

1. It is no answer to a suit against directors of a company, for infringement of a patent, that the acts were done by workmen employed by defendants, but contrary to their orders; the infringement having taken place in defendants' works, and in the course of the proper duties of the workmen.—*Betts* v. *De Vitre*, Law Rep. 3 Ch. 429, 441.

2. W., the defendants' servant, was killed in consequence of the negligent construction of a platform by N., also in their employ. N.'s fitness for his place was not denied, The jury were instructed, that, if the platform was completed before W. was engaged, and if the defendants had delegated to N. their whole power and duty, without control on their part, W. and N. were not fellow-workmen, and the defendants would not be discharged on that ground. *Held*, erroneous. N.'s duty was a continuing one. A master is not made liable to a servant for an injury caused by the negligence of a fellow-servant, by the simple fact that the latter is of a higher grade, as a superintendent.—*Wilson* v. *Merry*, Law Rep. 1 H. L. Sc. 326.

Misdemeanor.—*See* Obscene Publication.

Mistake.—*See* Estoppel.

Mortgage.

1. A mortgage was made, by one of the defendants to the plaintiffs, of a certain number of branded sheep, with their "issue, increase and produce." A second mortgage was made to the other defendants, which included other sheep. While the mortgagor was in possession, he mingled the latter sheep with the former;

but fraud was not alleged in the bill. *Held*, that the first mortgage did not cover sheep afterwards brought upon the run; and that on the pleadings the plaintiffs had no claim against such sheep outside the mortgage. Fraud must be specifically charged.—*Webster* v. *Power*, Law Rep. 2 P. C. 69.

2. A., B., C. and D. gave a mortgage to the defendant, who covenanted to reconvey, on payment of the mortgage debt, to the mortgagors, as tenants in common, their heirs and assigns, or otherwise, as they should direct. Some changes were made in the respective interests of the mortgagors. A. died, and the debt was paid. A draft of a reconveyance to C. and D. was objected to, as containing false recitals. A deed, with no recitals, executed by B. C. and D., and the heir and executor of A., was thereupon tendered to the defendant, who refused to execute it, demanding that the agreements affecting the interests of the mortgagors should be recited. *Held*, that, although defendant was not bound to execute a deed with false recitals, he could not object to one concurred in by all parties in interest because it contained none.—*Hartley* v. *Burton*, Law Rep. 3 Ch. 365.

See Equity Pleading and Practice, 2; Exonerate.

Negligence.

1. The defendants provided gangways from the shore to ships lying in their dock, the gangways being made with materials belonging to the defendants, and managed by their servants. The plaintiff went on board a ship in said dock on business, at the invitation of one of the ship's officers; and, while he was there, defendants' servants moved the gangway, and negligently left it insecure, so that it gave way, and the plaintiff was injured on his return, without negligence on his part. *Held* (by Bovill, C. J., and Byles, J.; Keating, J., *dubitante*), that there was a duty on the defendants toward the plaintiff not to let the gangway be insecure without warning him, and that he could recover damages for his injuries—*Smith* v. *London & St. Katharine Dock Co.*, Law Rep. 3 C. P. 326.

2. The plaintiff, while travelling by the defendants' railway, was injured by the fall of an iron girder, which workmen, not under the defendants' control, were employed in placing across the walls of the railway. It was proved that the work was very dangerous; that the defendants knew of the danger; that it was usual, when such work was going on, for the company to place a man to signal to the workmen the approach of a train; and that this precaution was not adopted. *Held*, sufficient evidence to warrant a jury in finding that the defendants were guilty of negligence and liable, even though the workmen were so also.—*Daniel* v. *Metropolitan Railway Co.*, Law R. 3 C.P. 216.

See Master and Servant, 2; Railway.

Negotiable Instrument.—*See* Debenture, 2.

Notice.—*See* Attachment; Banker; Company, 3.

Nullity of Marriage.

In a suit by a wife for nullity, on the ground of the husband's impotence, the only evidence of the same was that of the petitioner, which was contradicted by the respondent. The medical witnesses testified that she might have had regular intercourse with her husband consistently with the appearances, and there were circumstances discrediting the wife's testimony. A decree was refused.—*U.* v. *J.*, Law Rep. 1 P. & D. 460.

Obscene Publication.

A pamphlet, entitled "The Confessional Unmasked," besides innocent casuistical discussions, contained obscene extracts from Catholic writers, with condemnatory notes. It was published and sold at cost, solely for controversial purposes. It was ordered to be destroyed under stat. 20 & 21 Vic. cap. 83, sec. 1. (Mellor, J., *dubitante*.) It being found to be obscene, as a fact, within that statute, the intention to break the law must be inferred, and was not justified by an ulterior good object.—*The Queen* v. *Hicklin*, Law Rep. 3 Q. B. 360.

Parent and Child.—*See* Custody of Children.

Parties.—*See* Vendors and Purchasers of Real Estate.

Partnership.

The plaintiff and defendant entered into partnership as solicitors, for a term of seven years, the plaintiff paying a premium of £800. The defendant, before entering into the partnership, knew that the plaintiff was inexperienced and incompetent in his profession, and gave that as a reason for the amount of the premium asked. After two years, the defendant wrote to the plaintiff, accusing him of negligence, and saying that the partnership must be dissolved, and that he had instructed counsel to file a bill for that purpose. Plaintiff thereupon filed a bill for a dissolution, and for a return of a part of the premium, proportionate to the unexpired portion of the term. *Held* (reversing the decision of Stuart, T. C.), that the plaintiff could recover.—*Atwood* v. *Maude*, Law Rep. 3 Ch. 369.

Patent.

1. The specification of a patent may describe the process so insufficiently as to be bad, and

yet disclose enough to show that what is claimed by subsequent patent is not new. It is like a publication in a book, and it is not necessary that it should have been acted on, but only that it should be capable of being acted on, which may be tested by experiments, using any new facilities prior to the second patent. But it must furnish the knowledge necessary to carry it into practice with reasonable certainty, in order to invalidate the second patent.

The public use of an invention means a use and invention *in* public, not *by* the public.

This was a suit against brewers for infringement of a patent for capsules. Defence, that the capsules used were made in Germany, the bottles covered with them in Scotland, and sent through England for exportation only. *Held*, that the sending the bottles into England was an infringement. There is no distinction between an active and a passive use. Injunction granted. The mere use of the capsules was the very benefit intended to be derived, which continued while they remained on the bottles.

Since 21 & 22 Vic. cap. 27, the court can direct an account and award damages in the same suit.—*Betts* v. *Neilson*, Law Rep. 3 Ch. 429.

2. The plaintiff being possessed of a patent, granted to the defendants the exclusive license to work it in a certain district by an indenture, in which the latter covenanted to pay certain royalties, and to give every information, the better to enable the plaintiff to support the letters-patent; and the plaintiff covenanted for quiet enjoyment of the patent by the defendants; and that, in case any person should work the patented processes, the plaintiff would, at his own costs, commence and carry on all such actions, &c., as should be necessary to put a stop to such working of said processes; and that, in case the plaintiff should fail or neglect so to do, the defendants should not be liable "*thence forth*" to pay the said royalties, "*after the time of such person commencing to work the said processes*," until the plaintiff had, by law or otherwise, put a stop to such working. But the defendants were to keep an account of all royalties, that they might be paid to the plaintiff, on the enforcement of the patent right against the person infringing the same. *Held*, that the payment of royalties was not to be suspended, under the above condition, until the plaintiff had notice of an infringement, and until he had been allowed a reasonable time to institute proceedings to restrain the same.—*Henderson* v. *Mostyn Copper Co.*, Law Rep. 3 C. P. 202.

See Master and Servant, 1; Trial by Jury.

Pledge.—*See* Factor.

Power.

£5,000 were appointed on certain trusts subject to a power of appointment to the amount of £1,000. The fund, instead of £5,000, only amounted to £2,000. *Held*, that the appointee of the £1,000, and the persons entitled to the residue of the fund, must abate proportionately.—*Miller* v. *Huddlestone*, Law Rep. 6 Eq. 65.

Practice.—*See* Award.

Prescription.—*See* Trust, 2.

Presumption.—*See* Railway, 1; Stamp.

Principal and Agent.

Wool brokers gave a bought note for wool "bought of Messrs. R. & Co.," and a sold note for the same, "sold to *our principals*." It did not appear that the purchasers knew of this variance; but a usage in the Liverpool trade was proved, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, without informing the latter, may make himself also personally liable for the price. *Held*, that the usage was reasonable, and the brokers justified in giving the above sold note.—*Cropper* v. *Cook*, Law Rep. 3 C. P. 164.

See Factor.

Production of Document.

A plaintiff suing as transferee of a mortgage was ordered, before decree, to produce his transfer deed, for the inspection of the defendant's witnesses before they made their affidavits, upon the defendant's solicitor making affidavit that it was necessary in order to determine whether the same was forged, although the answer only denied the validity, and not the genuineness of said deed.—*Boyd* v. *Petrie*, Law Rep. 5 Eq. 290.

Profits.—*See* Account.

Promissory Note.—*See* Bills and Notes.

Proximate Cause.—*See* Railway, 3.

Railway.

1. A train of the defendants, while stationary on their railway, was run into by, and by the fault of, another train. Several companies had running powers over that part of the defendants' line, and no evidence was given whether the moving train belonged to or was under the control of the defendants. *Held*, that *prima facie* defendants were liable.—*Ayles* v. *South-Eastern Railway Co.*, Law Rep. 3 Ex. 146.

2. A railway carriage on which the plaintiffs (husband and wife) were passengers to R., on reaching R. overshot the platform on account of the length of the train. The passengers were not warned to keep their seats, nor was

any offer made to back the train to the platform, nor was it so backed. After several persons had got out of the carriage the husband did so, and the wife then took his hands and jumped from the step, and in so doing strained her knee. There was no request made to the company's servants to back the train, or any communication with them. It was daylight. *Held* (*per* Martin, Bramwell and Pigott, BB.; Kelly, C. C., *dissentiente*), that there was no evidence for the jury of negligence in the defendants.—*Foy* v. *London B. & S. C. R. Co.* (18 C. B. N.S. 225), distinguished.—*Siner* v. *Great Western Railway Co.*, Law Rep. 3 Exch. 150.

3. The plaintiff, on getting into a railway carriage, having a parcel in his right hand, placed his left hand on the back of the open door, to aid him in mounting the step. It was after dark, and he could see no handle, if there was one. The guard, without warning, slammed the door, throwing the plaintiff forward, and crushing his hand between the door and doorpost. *Held* (by Byles and Keating, JJ.; Montague Smith, J., *dissentiente*), that the jury were justified in finding that the guard was negligent, and that the plaintiff was not, and that injury was not too remote to be recovered for. *Fordham* v. *Brighton Railway Co.*, Law Rep. 3 C. P. 368.

4. But when the plaintiff had entered the carriage, and a porter gave warning, and then shut the door, in the ordinary course of his duty, the other facts being as above, *Held*, that the plaintiff could not recover.—*Richardson* v. *Metropolitan Railway Co.*, ibid, 374, in notes.

5. Cattle sent to London by the plaintiff over defendants' railway arrived Sunday, A.M., but by law could not be removed before midnight. Meanwhile they were placed in pens at the station, by the defendants' servants, assisted by a servant of the plaintiff. The plaintiff's servant coming again shortly after midnight, found two steers killed, and was refused leave to take away the remaining cattle unless he signed a receipt for the whole, which he declined to do. Later the plaintiff removed them, but by the delay missed a market. *Held* (*per* Bramwell and Channell, BB.; Martin, B., *dissentiente*), that the defendants' liability as carriers had ceased when the damage occurred.—*Shepherd* v. *Bristol & Exeter Railway Co.*, Law Rep. 3 Exch. 189.

See Attachment; Company, 2–4; Negligence, 2; Rent Charge; Ultra Vires.

Reconveyance.—*See* Mortgage, 2.

Register.—*See* Specific Performance, 1.

Release.—*See* Equity Pleading and Practice.

Remainder.—*See* Contingent Remainder; Will, 3–5.

Residue.—*See* Will, 8.

Rent Charge.

Land having been conveyed to the company in consideration of a rent charge, with a power to distrain on the land for arrears, the owner of the rent charge was allowed to distrain, although a receiver of the profits of the company had been appointed in a suit by the owner of a like rent charge, on behalf of himself and other such, who might choose to come in.—*Eyton* v. *Denbigh, Ruthin & Corwen R Co.*, Law Rep. 6 Eq. 14.

Res Adjudicata.—*See* Collision.

Rescission.—*See* Vendor and Purchaser of Real Estate.

Sale.

1. T. & Co. ordered whiskey of M. & Co., who knew the purpose for which the same was wanted, for barter on the African coast. The spirits were to match one sample in price, flavor and strength, and another in color. They were colored with logwood, which, though not shown to be injurious to health, produced alarming physical effects, and made the natives think it poisoned. By 10 & 20 Vic. c. 60, s. 5, where goods are sold for a specified purpose, the seller warrants that they are fit for that purpose. On an issue, whether the whiskey was colored with an "innocent" material, the judge in Scotland refused an instruction, that T. & Co. must prove that the logwood was injurious to the health of the consumer before they could recover; and there was a verdict for them. *Held*, that the refusal was right, and that M. & C. were liable in damages.—*McFarlane* v. *Taylor*, Law Rep. 1 H. L. Sc. 245.

2. P. *bona fide* ordered and paid for goods of the W. I. Company, which loaded the same on a railway to his address, and sent him the invoices, after the presenting of a petition, but before the winding-up order. *Held*, that the disposition of the property was complete before said order, and the goods were ordered on this ground, as of course, under Companies Act, 1862, sec. 153, to be delivered to P.—*In re Wiltshire Iron Co., Ex parte Pearson*, Law Rep. 3 Ch. 443.

See Damages; Stoppage in Transitu.

Salvage.

A collision occurred between two vessels, A. and B. A. was in tow of a steam tug; the tug afterwards rendered assistance to B. B. was found solely to blame for the collision. *Held*, that the tug's right to salvage was not affected

by 25 and 26 Vic. cap. 63, sec. 33, which makes it the duty of ships mutually to assist each other after a collision.—*The Hannibal, The Queen*, Law Rep. 2 Adm. & Ecc. 53.

Satisfaction.

G. covenanted with the trustees of the marriage settlement of his daughter P., to pay them £12,000, and an annuity of £300 for her separate use, without power of anticipation. G. subsequently give his other daughter, L., £12,000 also. By will, G. charged his real estate with an annuity of £400 for the separate use of P., and with one of £1,000 for L., and, in a certain event, with £1,500 each, additional. G. devised his real estate, "charged with the four several annuities to his daughters," and bequeathed his residuary personal estate, subject to the payment of his debts. *Held*, having regard to the tone of the will, and the direction for the payment of debts, that P. was entitled to the £400 annuity, in addition to that of £300, which she took by the settlement.—*Paget* v. *Grenfell*, Law Rep. 6 Eq. 7.

Scire Facias.—*See* Execution.

Servant.—*See* Master and Servant.

Shareholder.—*See* Bankruptcy, 2; Company, 1–3 Execution.

Shelley's Case, Rule in.—Analogous Rule as to Personal Property.—*See* Legacy.

Ship.—*See* Admiralty; Charter Party; Collision.

Slander.

Slander. "You have heard what has caused the fall" (*i.e.*, in certain shares); "I mean, the rumour about the South Eastern chairman having failed:" meaning thereby that the plaintiff had become insolvent. Plea, that defendant meant, and was understood to mean, that there was a rumour to the above effect, and not that the plaintiff had become insolvent, as in the inuendo alleged, and that it was true that there was such a rumor. *Held*, that the plea was bad. The existence of the rumor did not justify its repetition, the latter not being shown to be privileged, and the truth of the rumor not being pleaded.—*Watkin* v. *Hall*, Law Rep. 3 Q. B. 396.

See Judge.

Specific Performance.

1. The plaintiffs contracted to sell shares, purchased from and registered in the name of C., to agents of the defendant, whose name was given and inserted in the transfers from C. These were sent to him, and were not afterwards forthcoming, and he paid the purchase money; but more than a month afterward he refused to have them registered, saying that he had bought for others, without a guarantee that he should be registered, and that he had not authorized his agents to give his name as transferee. A bill for specific performance was filed, which was decreed, although an order had been made for winding up the company since the filing of the bill. Defendant was also ordered, in addition to the decree of Stuart, V.C.) to give indemnity for all expenses which might be incurred by the plaintiff in respect of the shares not having been registered in the name of the former.—*Paine* v. *Hutchinson*, Law Rep. 3 Ch. 388.

2. A broker purchased shares of the plaintiff, in a company subsequently wound up, for and by order of W. By the usage of the Stock Exchange, the purchaser's name was not disclosed to the plaintiff until the next settling day, when the broker, also by order of W., gave the name of G., the defendant. The deeds of transfer were made out to G., handed to him for execution, kept by him for some time, and finally deposited as security for the purchase money with which he was debited. G. expressed no dissent to the vendor, but only to W. Specific performance was decreed against G.—*Shepherd* v. *Gillespie*, Law Rep. 5 Eq. 293.

3. Upon the sale of a public house as a going concern, time is of the essence of the contract. When, instead of being able to procure a transfer of the license in five days from the time of sale, as they were bound to, the business going on meanwhile, the vendors could only obtain one for the defendants by a more expensive process, with considerable delay, and, after a suspension of the business for two or three days, a decree for specific performance was refused.—*Day* v. *Luhke*, Law Rep. 5 Eq. 336.

4. In November, 1861, S. agreed to purchase from the plaintiff "the mill property, including cottages, in E.; all property in E. to be freehold;" and verbally agreed to take a limited title. A correspondence was carried on for the purpose of perfecting the title till December 12, 1864, when notice was sent to the plaintiff, that, unless he complied with certain requisitions, within a week, S. would require a perfect title to be made out within five weeks, or would abandon the bargain. A bill for specific performance was filed August 12, 1865. *Held*, that the written contract was not too ambiguous to satisfy the Statute of Frauds, or to be enforced; that there was no culpable delay, as the time occupied in negotiations must be excluded, and the notice of December 12 was an admission of a subsisting contract; that the limited title was not an objection, as defendant had notice, agreed to it, and also had waived the point by

not raising it sooner; and that, though either party may by subsequent notice make time of the essence of the contract, a reasonable time must be allowed, which had not been done. The decree limited objections to title to those made in a letter of June 14, 1863, accompanied by an opinion of counsel, and accepting the title, subject thereto.—*McMurray* v. *Spicer*, Law Rep. 5 Eq. 527.

Stamp.

By the 17 & 18 Vic. cap. 83, sec. 5, no person shall be entitled to recover in an action brought on any foreign bill of exchange, unless it had the stamp required by the act upon it at the time it was transferred to him. In such an action, the plaintiff could not remember whether the bill was stamped when he received it, but it was so when produced at the trial. *Held*, *prima facie* evidence that the act had been complied with.—*Bradlaugh* v. *De Rin*, Law Rep. 3 C. B. 286.

Statute of Frauds.—*See* Damages, 2; Specific Performance, 4; Trust, 1.

Statute of Limitations.—*See* Limitations, Statute of.

Stoppage in Transitu.

Goods were shipped by A. in Calcutta to B. in England. B. pledged the bill of lading to C., and afterwards became bankrupt. On the arrival of the ship in which the goods were, C. obtained from the ship's brokers, on payment of the freight, an overside order for the delivery of the goods. This order was presented to the officer of the ship, who promised C. should have the goods as soon as they could be got at. Before the ship broke bulk, A. forbade the delivery of the goods. *Held*, that A. had not lost his right of stoppage *in transitu*. The goods were not brought into the possession, actual or constructive, of B. by the promise to C. After satisfying C., A. had a right to the surplus proceeds, as against the assignees in bankruptcy of B.—*Coventry* v. *Gladstone*, Law Rep. 6 Eq. 44.

Tenant in Common.—*See* Will, 6.

Time.—*See* Specific Performance, 3, 4.

Trial by Jury.

The defendant to a bill for an injunction to protect a legal right, viz., a patent, cannot claim a trial by jury as a matter of right. Before St. 21 & 22 Vic. c. 27, and 25 & 26 Vic. c. 42, such cases were sent to be tried at law, not to obtain a jury trial, but because the judgment of a common law court was required. *Bovill* v. *Hitchcock*, Law Rep. 3 Ch. 417.

Trust.

1. When a person knows that a testator intends certain property to be applied for purposes other than for his own benefit, and, either expressly or by implication, promises so to apply it, and it is left to him on the faith of that promise, it is a case of trust, and the devisee cannot set up the Statute of Frauds. Decree of the Master of the Rolls reversed on the evidence.—*Jones* v. *Badley*, Law Rep. 3 Ch. 362.

2. It having been *held*, reversing the decision of the First Division of the Court of Session, that the appellants were entitled to the fee simple of certain lands by a devise to charitable uses, two hundred years before, and not only to a rent charge of a certain sum, it was further *held*, that the respondent having acknowledged the trust, and the question being only as to its extent, the question of prescription did not arise.—*University of Aberdeen* v. *Irvine*, Law Rep. 1 H. L. Sc. 289.

3. By a marriage settlement, made in 1821, stock belonging to the wife was assigned to B. and another, in trust for the separate use of the wife for life, remainder to the husband for life; remainder, in default of children of the marriage, to B. The trustees neglected to have the stock transferred to them, and in 1822 the husband and wife sold it, and the former took the proceeds. B. died in 1829, the husband in 1858, and the wife in 1864. There were no children. In 1866, B.'s executors claimed the trust fund from the husbands' estate. *Held*, that the claim was not barred by the Statute of Limitations (which did not begin to run until 1864), nor by B.'s acquiescence. His cognizance of the misapplication of the trust funds could not be inferred from his having taken no step, for eight years, to secure them. Any other *cestui que trust* could have compelled the husband's estate to refund; and the fact that B. was also a trustee did not change the case.—*Butler* v. *Carter*, Law Rep. 5 Eq. 276.

See Banker; Limitations, Statute of, 3; Wills, 6, 8.

Ultra Vires.

1. In October, 1864, the defendant company, having borrowed all the money (£60,000) which it was empowered to, issued a debenture for £500 to W. Later in the same year, seventeen similar debentures were satisfied by a sale of goods on execution. February, 1865, the directors re-issued four debentures for £500 to E., in return for his check for £1,000, and an overdue Lloyd's bond for £1,000. March, 1865, they re-issued ten more debentures for £500, to E., for cash; and in July, 1865, they issued one for £1,000 to L., under an agreement for the hire of engines. By §§ 39, 40 of the Com-

panies Clauses Act (8 & 9 Vict. c. 16), the power of re-borrowing shall not be exercised without the authority of a general meeting of the company; and a copy of the order of a general meeting giving such authority, and certified by one of the directors to be a true copy, is sufficient evidence of the same having been made. No general meeting was called to authorize the above re-borrowing. *Held*, that the debenture issued to W. was void, as *ultra vires*. Those issued to E. for cash were valid, notwithstanding the want of a general meeting. The above § 39 was not for the protection of other creditors, but of the company against the directors; and though the latter might be personally liable, as between themselves and the company, the clause was directory, as against the holder of the debenture. The debentures issued for the Lloyd's bond were void, unless it could be shown that it was given for money due to a contractor or the like, and not merely for money borrowed. L. was to be paid the amount actually due him under the agreement.—*Fountaine* v. *Carmarthen Railway Co.*, Law Rep. 5 Eq. 316.

2. Defendant Company A. was registered for financial operations; by the articles, the limitation of the liability of shareholders was to be unalterable, but there was a power to amalgamate with other companies having the same objects. In March, 1865, it was agreed between the respective directors that Company A. should be amalgamated with Company B., registered for banking and financial operations, and "any further objects which the company might from time to time adopt." Shareholders of A. were to take 25,000 shares of B. at £6 per share, to be credited as £5. The sum of £150,000 to be paid from the assets of A., and, if they proved insufficient, then by a call on the shareholders of the same. The amalgamation and the winding up of A. were resolved on, April, 1865. *Held*, not within the powers of the directors of A., under their articles, as the objects of B. were different, and the liability of the shareholders of A. was increased; nor under Companies Act, 1862, § 161, as it was not a sale of the assets of A., with an option of purchase of shares in B., but a binding of A. to take so many shares, and making its shareholders liable to a call for that purpose before it could be dissolved.

The plaintiff, as shareholder in A., first knew that any thing erroneous had been done in June, 1865. In September, 1865, notice of the registration of certain shares in B., under the arrangement, was first sent to the Registrar of Joint Stock Companies, and advances were made by B. to A., nothing serious having been done before. Bill filed Nov. 10, 1865, on behalf of all the stockholders. *Held*, not too late; and, though some stockholders had assented, that plaintiff was competent to sue, on behalf of all, to set aside a transaction which was *ultra vires*.—*Clinch* v. *Financial Corporation*, Law Rep. 5 Eq. 450. See *Imperial Bank of China, I. & J.* v. *Bank of Hindostan, C. & J.* Law Rep. 6 Eq. 91.

As to secret receipt of money by directors of the old company in such case, see *Atwool* v. *Merryweather*, ib. 464, in notes.

See Attachment, 2; Company, 2; Debenture, 1; Winding up, 1.

Undue Influence.

Persuasion is not unlawful; but pressure, of whatever character, if so exerted as to over power the volition, without convincing the judgment, of a testator, will constitute undue influence, though no force is either used or threatened.—*Hall* v. *Hall*, Law Rep. 1 P & D 481.

Usage.—*See* Principal and Agent.

Vendor and Purchaser of Real Estate.

W. agreed to buy of B. an estate for £250,000, which he then agreed to sell to the A company for £350,000. By both agreements the acreage was to be conclusively shown by the title deeds, and was specified in the agreements; but B. told W., who told the company, both acting *bona fide*, that there were 1,580 acres. Before making their agreement, the company had the estate valued by a surveyor; but it did not appear whether he measured it. After W. had paid B. £50,000, and the company had paid W. £75,000, and had given him their bonds for £75,000, the company refused to complete the purchase, alleging a failure in quantity. The lands were mineral lands, and, after a failure of a third, would have lasted two hundred years. W. thereupon refused to complete his purchase on the same ground, and sued B. for £50,000 and damages. B. offered to reduce the purchase money £50,000, and W. made a like offer to the company; but both offers were refused. W. compromised his action, B. repaying £50,000, and their agreement was cancelled. The company was wound up, and the liquidator, six months after their repudiation of the purchase, sued W. to have the contract cancelled, the £75,000 and the bonds returned, and that W. should be enjoined from parting with the bonds. The bill did not allege a deficiency of acreage, and there was no evidence of it,

Held, that the company had no right to rescind the contract; that they could not recover the purchase money paid, in equity, on the ground of a lien upon it, which they had not, or on any other ground, *assumpsit* being the proper remedy; that as to the bonds the suit was needless, as they could only be assigned subject to the equities between W. and the company, and could not be sued upon without leave of court; bill dismissed without prejudice to any rights at law.

After his agreement with B., W. agreed with C., D., and E., to share the profits of the resale with them in certain proportions. W., C., D., and E. got up the company, and part of the money received by W. from the company was used by them jointly. *Held*, that C., D., and E. were improperly joined as defendants.—*Aberaman Ironworks* v. *Wickens*, Law Rep. 5 Eq. 485.

See Damages; Specific Performance, 4; Way.

Vested Interest.

A testator bequeathed £20,000 in trust after his daughter's death, for such of her children as she should appoint, and, in default, for all her children who should attain twenty-one, in equal shares as tenants in common. He gave powers of maintenance out of the income of the share to which any such child might be presumptively entitled, and powers of advancement to the extent of one-fourth of the portion to which any such child should be presumptively entitled. The daughter, by her will, appointed that the trustees should raise for each of her two younger children, F. and M., who should reach twenty-one, £2,000, and subject thereto, as to the whole of the fund, to all of her children who should reach twenty-one, in equal shares as tenants in common. She died, leaving four children. The eldest of these having reached twenty-one, *held*, that said eldest child was entitled to one-fourth of the income of the whole £20,000 which had accrued since the death of her mother; and that after payment to her of her share of capital, she would be entitled, during the respective minorities of F. and M., to one-fourth of the income of the two sums of £2,000 appointed to them in the event of their reaching twenty-one respectively.—*Gotch* v. *Foster*, Law Rep. 5 Eq. 311.

See Will, 7.

Waiver.—*See* Specific Performance, 4.

Warranty.—*See* Sale.

Way.

The owner of two adjoining closes, A. and B., made and used a way across B. to A. for farm purposes, and afterwards conveyed A., "together with all ways . . . thereto appertaining, and with the same now or heretofore occupied or enjoyed." The purchaser had access to A. from other land of his own. *Held*, that, as there was no roadway over B. to A. before the unity of possession, the right to use it did not pass by the above grant.—*Thompson* v. *Waterlow*, Law Rep. 6 Eq. 36 followed.—*Langley* v. *Hammond*, Law Rep. 3 Exch. 161.

See Company, 4.

Will.

1. A will, disposing only of property in a foreign country, is not entitled to probate in England.—*In the Goods of Coode*, Law Rep. 1 P. & D. 449.

2. A will, after specific devises and bequests, continued as follows: "I give *all the rest of my* household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, *estate and effects*, of what nature or kind soever, and wheresoever the same shall be at the time of my death," to trustees, "*their executors, administrators and assigns*," to sell and pay the proceeds as directed. (Surplus, after payment of debts and a legacy, to A. and B.) Then followed a bequest of ready money, proceeds of the sale of specified land, securities for money, and all sums due to testator at his death, and then further specific bequests. At the date of the will, and at the time of his death, testator was seised of a freehold estate not mentioned in the will. *Held* (contrary to the decision of *Sanderson* v. *Dobson*, 1 Exch. 141, and following s.c. 7 C.B. 81, approved in *O'Toole* v. *Brown*, 3 E. & B. 572), that said freehold passed by the words "all the rest of my estate."—*Dobson* v. *Bowness*, Law Rep. 5 Eq. 404.

3. Gift to A. until B. reaches twenty-one, then to B. If B. should die before her estate "should be received," then over. Codicil, giving A. the income for life. *Held*, that "received" meant "vested," and that B.'s estate vested at twenty-one, though not to be paid to B. until A.'s death.—*West* v. *Miller*, Law Rep. 6 Eq. 59.

4. Bequest of a residue in trust to pay one-fifth of the income each to A., B., C., D., and E. for life, remainders to their respective children. In case of the death of either of the first takers, "without leaving issue," his share to go to the survivors in like manner as the original shares. It was added, that none of said shares should be "so paid to or become *vested* interests in" either of said children, until he attained the age of twenty-five; but, in the

mean time, trustees might pay any part of the income towards the maintenance and education of such children respectively. Proviso (void for remoteness), for the accruer of shares of children dying before twenty-five to survivors; and then it was declared that, in case of death of child before such share accrued, it should again accrue in like manner, but provided that in case such child should have left issue, such issue should take such share as his parent would have had "if living," such share "to be paid to" such issue at such age as before directed as to payment of parent's original shares. *Held*, that the word "vested" must be construed as meaning "indefeasible;" and that the remainders to children vested in such of said children as were alive at the death of testatrix or born afterwards.—*In re Edmondson's Estate*, Law Rep. 5 Eq. 389.

5. Devise to testator's wife for life, then to his daughter; upon her decease, "equally between my surviving brothers and sisters, and those of my wife." The testator's daughter survived him, but died before his wife. Some of the brothers and sisters died before the daughter, others after her, but before the wife. *Held*, that on the death of the wife there was an intestacy. The word "surviving" meant surviving the survivor of the tenants for life. —*Howard* v. *Collins*, Law Rep. 5 Eq. 349.

6. A testator gave £3,000 to his executors in trust for M., for life, and after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage." The executors died in the lifetime of M. *Held*, that the children of M. who survived her were entitled to the fund as tenants in common.—*In re Phene's Trusts*, Law Rep. 5 Eq. 346.

7. A testatrix devised the T. estate to J. for life, with remainders to the sons and daughters of J. successively in tail. Proviso, that if any tenant for life or in tail in possession should neglect to reside on the T. estate for six months, said estate should go to the person next entitled in remainder, as if the person so neglecting were then dead without leaving issue; she then bequeathed her residuary personal estate in trust for the children of the person who should at her death become tenant for life of the T. estate ("*other than* and besides *an eldest* or only *son for the time being entitled* in tail in remainder expectant on the decease of his parent" to the T. estate) who should attain twenty-one or marry; and if there be but one child beside such eldest or only *son for the time being entitled as aforesaid*, then in trust for that one child, with a gift over if there should be no such children, or if they should all die before any of them should attain a vested interest. J. survived the testatrix, neglected to reside on the T. estate for six months, and died leaving a posthumous son, D., who was his only child. *Held*, that D. was entitled to the residuary personal estate, as by reason of J.'s forfeiture before his birth, he never had been entitled in tail in remainder to the T. estate; and that being an only child he took a vested interest at his birth.—*Johnson* v. *Foulds*, Law Rep. 5 Eq. 268.

8. A testator gave his residuary real and personal estate in trust for his "five sons" as tenants in common, and by a codicil revoked and made void the said trust so far as the same related to R., one of the said sons, or his right therein, and in lieu thereof gave £15,000 in trust for R., his wife and children; and if R. should have no children, said legacy was to sink into the residue, but so that R. or his representatives should take no share or interest therein. *Held*, that the testator died intestate as to the trusts of one-fifth share of the residue, and that the £15,000 was not payable out of such share, but was payable before the residue was ascertained.—*Sykes* v. *Sykes*, Law Rep. 3 Ch. 301.

See Ademption; Administration; Advancement; Canada; Contingent Remainder; Exoneration; Illegitimate Children; Legacy; Marshalling of Assets; Power; Satisfaction; Trust; Undue Influence; Vested Interest. Witness.

Witness.

Bequest of £200 to B. church, to be disposed of as I. pleases. I.'s wife was one of the witnesses. *Held*, that as I. was a mere trustee, the attestation of his wife did not invalidate the bequest, under the Wills Act.—*Cresswell*, sec. 15, v. *Cresswell*, Law Rep. 6 Eq. 69.

Words.

"*Cause of action.*"—See Cause of Action.
"*Accident.*"—See Charter Party, 2.
"*Permanent use.*"—See Company, 4.
"*Lawfully begotten*"—See Conflict of Laws, 1.
"*House.*"—See Curtilage.
"*Out of my estate.*"—See Exoneration.
"*Office,*" "*Place.*"—See Gaming.
"*Next of kin.*"—See Illegitimate Children.
"*Increase.*"—See Mortgage, 1.
"*All the rest of my estate.*"—See Will, 2.
"*Received,*" read "*Vested.*"—See Will, 3.
"*Vested,*" read "*Indefeasible.*"—See Will, 4.
"*Surviving.*"—See Will, 5.

GENERAL CORRESPONDENCE.

To the Editors of the Canada Law Journal.

Privileged Communications—a curious case.

Messrs. Editors—I cut out from a newspaper a curious decision just given in the courts of the State of New York, respecting mercantile agency companies. The case comes under the law relating to privileged communications. Under this head of the law of evidence there have been, as you know, in recent times some sharp debates and discussions among legal men and in courts. It has been attempted (especially in Ireland) to lay down the doctrine, that what a person may disclose in the confessional to a Roman Catholic priest is *sacred* or *privileged*. English and American courts have generally (I think almost uniformly) refused to allow this privilege, that the confessional is not a place in which a man can confess a crime, and yet keep the priest's lips forever sealed. We know that courts hold that there are various privileged communications, and privileged speeches. Such for instance as the admissions of a client to his attorney, and the fair account that a master may give of the character of his former servant to one enquiring about him or her. We know that telegraphic communications may be privileged either by law or under peculiar circumstances. We know that the speeches of counsel at the bar, of members of Parliament, and of a witness in giving evidence in courts, as well as information given to the executive on complaints, are generally, unless in extreme cases, privileged. The formation of mercantile agencies is of very recent date, and I have not before noticed any case, in which the question of how far written or verbal communications to a mercantile agency, concerning a firm or a person, if slanderous or tending to injure it or him, if false, would be actionable. Here is the case to which I refer:

The Firm of Dun, Barlow & Co., known as Dun, Wiman & Co. in Canada, gave information to an enquirer in regard to another person, stating that the latter was in bad business odour, being the companion of counterfeiters, a dangerous customer, ect. The man found out the authors of the character so given to him, brought a suit for slander, but was non-suited in a New York city court, on the ground that the communication was privileged. The plaintiff took his case to the Supreme Court, when the judgment was sustained. It being of importance to business men, a portion of the judge's decision may be quoted:—"I cannot concede that, in the large population of a crowded city, and in a mercantile community where false representations, fraud, dishonesty and insolvency are easily concealed, and but imperfectly known, or known to but few when detected—where it is easy for strangers to practice upon the unwary or unsuspecting—a business is to be characterized as unworthy which aims only to give correct information to those whose interest entitles them to seek it wherever it may be had."

One can easily conceive a case where a private individual or a firm might be greatly injured, perhaps ruined in a pecuniary point of view, by a secret enemy giving information which after all is false, concerning him or it. I cannot see why in such a case the injured individual should not have a remedy, or why any such circumstances should be privileged. I knew a recent case where "A." a trader, had been in poor even bankrupt circumstances. The above mercantile agency kept his name on the list of doubtful cases long after he had settled his difficulty, and he could not get a note discounted in consequence. A professional man was employed to get the company to set the thing right. Is "B." who slanders "C." by giving false information to the above mercantile agency, such for instance as that he had been charged with embezzlement or obtaining goods under false pretences, or perhaps making a fraudulent sale of all his goods—to go free—and "C." be without legal remedy simply because a mercantile agency company registers it in a Secret Book, seen in all parts of Canada and the United States? "B." goes to New York or to Montreal, and every reader of the secret books of the mercantile agency look on him with suspicion. He knows not the reason unless he too is in the secret.

An agent of this company may *negligently* or dishonestly give a false account of a man's position and seriously injure his business, and will the law give no remedy? I trust this is not the law in Canada.

There are maxims in the common law which ought not to be trampled on or forgotten. Such as "*sic utere tuum ut non alienum.*" The mercantile agency may be useful, but because it is so, it should be careful to know facts—to ascertain the truth, before it publishes anything; otherwise pay damages for its mistakes. Every injury to an innocent man should have a legal remedy.

October 22ad, 1868. Justitia.

To the Editors of the Canada Law Journal.

Gentlemen,—My attention has been directed to a letter in the last number of the *Law Journal*, signed "LL.B.," criticising, in very questionable spirit and tone, the report of the case, "*In re Moore* v. *Luce*," contained in the current volume of the Common Pleas Reports. I may not be doing more than I am called upon, in answer to your querulous correspondent, when I say that the report in question was submitted, before publication, for the approval of the same able and pains-taking judge who wrote and delivered the judgment of the court in the case, and who did not deem it necessary that the judgment of the County Court (the omission of which, as you say, forms the gravamen of the complaint made) should be given in any more extended form than it was.

There may be a redundancy of statement in one part of the report, as your correspondent charges, but that is, after all, a matter of opinion; and there may be an inaccuracy as to the disposition of the costs in the court below, though my sources of information ought to have been as reliable as your correspondent's, which appear to have been mere hearsay; but there being no question of the kind before the appellate tribunal, it was just as unimportant as if it had been stated that the judge below delivered his judgment in a standing instead of a sitting posture.

There is, I believe, another exception taken to the report, which seems to be equally trifling.

As to the judgment itself, from which your correspondent makes several quotations, and complains that the reporter "does not explain" this (!) and "does make the judge say" that (!!); as it would have been the height of presumption, on the reporter's part, to have done either the one or the other, it would be equally presumptuous now, were I to attempt a defence either of the worth or the phraseology of that judgment, both of which your correspondent is bold enough to call in question, though safely enough, to be sure, under his anonymous subscription. No doubt, however, the court itself will, if its attention is called to his letter, at once see the error it has fallen into in both respects, and, if possible, take the earliest opportunity and means of putting itself right.

Inaccuracies, as well of the pen as of the tongue, are more easily detected than avoided, as your correspondent, with his hypercritical acumen, will no doubt find *on carefully revising his own letter*. As you truly observe, the work of reporting is no easy matter, and errors will creep in, however great the care bestowed upon it, though to none can this be more annoying than to the reporter himself. It is so with the leading reports in England, as may be seen by the numerous *errata* at the end of some of the volumes of the present series of "Law Reports," as well as by examining the text itself, inaccuracies in which have in many instances been overlooked altogether. Where, however, there is, on the whole, an honest desire evinced on the reporter's part to do his work well, a profession distinguished, *as a rule*, for its generosity, should extend to him, as it no doubt will, that indulgence and forbearance—in the case, at any rate, of unimportant defects—which he ought to feel himself entitled to expect.

I am, Gentlemen, yours, &c.,

S. J. Van Koughnet,

Toronto, Nov. 1868. *Reporter C. P.*

REVIEWS.

Georgia Reports, vol. 35. December Term 1866; and a Table of Cases, reported in the first 31 volumes of the Georgia Reports: By L. E. Bleckley, Esq., late Reporter of the Supreme Court of Georgia. Atlantic Ga., 1868.

We have to acknowledge the above through the courtesy of Mr. Bleckley.

The cases seem to be carefully reported, and many of them decide points of interest, more especially to the American people—such, for example, as the case of *Clarke* v. *The State of Georgia*, which is an authority, founded on an act of the Legislature, that persons of color are competent witnesses in all cases, just as white persons are; a proposition which to us seems sufficiently reasonable, and beyond discussion, though the lesson has been a difficult and a bitter one for Southerners to learn.

The reporter gives, in an appendix, some decisions of Judge Erskine, of the same State. The first of these must have been felt as a relief to the exasperated feelings of honorable men in the South, whatever the ultimate result of it may have been. In *Ex parte William Law*, he held that an attorney or

counsellor, duly admitted to practice in a court of the United States, and practising there prior to the late civil war, and who has received and accepted a full pardon from the President, &c., may resume his practice in the said court, without taking the oath prescribed by the act of Congress, which act required an oath, in certain cases, that the person had not borne arms against the United States, or submitted to the authority of the Confederate Government, &c.; such act being, in its application to such person, in the opinion of the judge, unconstitutional and void.

The American Law Register, October, 1868. Philadelphia; D. B. Canfield & Co., 430 Walnut Street.

We again extract largely from this much valued legal periodical. The writers are we understand, some of the best men of the Bar in the United States, and they receive from various sources interesting decisions of late date. We notice that the price is raised to $5. We are surprised that this was not done before.

The Chicago Legal News. Vol. I., Nos. 1, 2 & 3.

It is a refreshing instance of the march of civilization in general, and of its progress in a westerly direction in particular, that a weekly legal paper of "eight four column pages" has been started, under the editorial management, not, as we unenlightened Britishers might suppose, of a learned counsel or even of a judge, but under the sprightly management of *Mrs. Myra Bradwell*, the "better half," it may well be supposed, of the judge of the County Court of Cook County, Illinois. When the editress speaks of "*our* husband" we may hope that there is every probability of his being kept strictly in the way wherein an upright judge should walk.

The learned editress has evidently secured the good will of the Bench and Bar in her neighbourhood, as they seem to assist her with many contributions in the way of articles, reports and selections, in which by the way as might be supposed, the rights of women figure rather largely.

We wish our sister (of the Press) all success in her, to our old fashioned eyes, novel undertaking.

A Romantic Law Case.—The courts of law will in all probability be occupied early in the ensuing session with one of those remarkable cases which so often occur in romances, and so seldom in real life. It appears that about a hundred and twenty years ago a large estate close to one of the most important of English manufacturing towns, was in the possession of the great-grandfather of the parties to the present litigation. Since that time the land has been built upon to a great extent, and now forms the most wealthy suburb of the town in question. At the death of the owner, his eldest son, finding that there was no will, naturally claimed the estate. The children of a second marriage, however, who had never lived on good terms with their half-brother, protested against his title on the ground that his parents had never married, and that he was consequently illegitimate. It seemed at first that there was no ground for this statement. The parents had always been received in society, and no one had ever heard of any scandal in connection with them. On making inquiry it was, however, found impossible to discover any trace of the marriage, and the eldest son was forced to submit, and leave the home he had always considered his own, without a shilling. He went into town and embarked in trade, apparently without much success, for his grandson is at the present time a shoemaker in a back street, and in a very small way of business. The tradition of the lost estate has, however, always been preserved, and some time since this descendant of the elder son recommenced the search for proof of the marriage in question. After much trouble he succeeded in getting at the copies of the registers which are preserved in the Chancery at Chester, and there, in the index, he discovered, somewhat easier than was expected, the names of the original possessor of the estate and his first wife. There was, however, no such entry in the body of the book. At last, however, in going through it for the last time, it was discovered that two leaves had been fastened together, and on their being separated a copy of the entry of the marriage from the books of a Manchester church was duly found. On referring back to the church itself, the book was produced, but the entry was not there. Further examination showed, however, that this book had been tampered with, but in a different way—a leaf had been cut out with scissors, and the marks were even then distinctly visible. On these facts the action will be brought, and when it is remembered that the present family have been in possession for nearly a century, and that they are highly respected, and their members married amongst the wealthiest people in the county, it may readily be imagined that the matter is creating a good deal of interest. The value of the property at stake is between one and two hundred thousand pounds.—*Western Morning News* (*English*).

TO CORRESPONDENTS.

"A Student."—Our rule is not to notice letters unless verified by the signature of the writer.

"F. W. O."—Thanks—Was any written judgment given by the Court of Chancery, and when, &c. It would be advisable to give further information with respect thereto.

"St. Thomas."—Insolvency case received with thanks, will appear in December Number.

THE

Canada Law Journal.

DECEMBER, 1868.

AN ELECTIVE JUDICIARY.

An unstained and competent judiciary is a blessing which no country can be without and prosper; and though we hope that we may never be without this blessing, it may not be amiss to cast a glance at the progress of the decline of the judicial status in another country, which, from its near proximity, and the intimate relations we must have with it, may exert some slight influence, and the less the better in legal matters, upon our affairs. It would certainly be bad enough if the Ministry of the day, whatever it might be, sacrificing the good of the country and the honor of the profession to the mere exigency of party politics, were to lose sight of the responsibility thrown upon them by their position, to select competent men as judges (which has occasionally been done and doubtless will be again), but a thousand times worse would be the curse of a judiciary elected by popular vote.

A writer in the *American Law Review* brings prominently and boldly before the public a state of things, which must be bad indeed, before an American would so speak of it. In speaking of the Erie Railroad "Row," which he remarks is the only fitting term for the scenes that occurred in the New York Courts, arising out of the operations of those contending for the control of that road, he says, "such an extraordinary perversion of the process of law; such an utter absence of respect for the bench; such contempt for the forms and courts of justice as was there exhibited, ought not to pass unnoticed." The writer speaks of this "extraordinary legal episode" as possibly indicative of the morals of the place and the times, but more particularly seems to ascribe the scenes "which disgraced the New York Courts in the spring of 1868" to the gradual, but inevitable, result of an elective judiciary. The writer of the article, whom we can well believe to be one who deeply feels the disgrace attaching to his profession by the conduct of those who ought to sustain its honor, after an able *exposé* of the case, thus concludes his indignant remarks—

"A little additional infamy, a little additional evidence of public contempt, is a small matter now to the judiciary of New York City. Other communities, where the judiciary have been more fortunate, may draw a useful lesson from their fate. The judiciary, like the executive and legislative branches of a government, can only in the long-run reflect, more or less nearly, the average moral and intellectual condition existing somewhere in a community. A community inherently corrupt will not in any event long preserve a pure judiciary. That branch of the public service however, more than either the legislative or the executive, can be made to represent the better, more intelligent, and more virtuous elements of the community: it can, by a proper machinery of selection, be kept on the highest possible level of intellectual and moral development. It can also, by other machinery, be reduced to the lowest level. The experience of this and other countries has thrown much light on this subject. Chancellor Kent once filled the chair now occupied by Mr. Justice Barnard. Since the days of the great chancellor, the ermine worn by him has been flung into the kennel, to be snatched at and trampled on by the rabble of the caucus and the bar-room. Behold the result! The machinery now in use in New York is wholly calculated to draw the material out of which to manufacture its judiciary from the worst instead of the best materials the community affords: it is calculated to degrade, not to elevate. That responsibility for appointment which should rest upon one man, is divided and lost among the many. Even if it were not, and even though a party caucus of professional politicians were as competent to select a judge as a responsible executive, yet who could aspire to great judicial eminence as the result of a popular election to a term of eight years on the New York bench? The system provides an inferior material, and then deprives it of its greatest incentive to improvement. Finally, who that respects himself, as a great judge should, and as all great judges ever have, could periodically tread the miry ways of city politics, to elevate himself to a bench which has become a recognized part of the spoils of political victory? The system has everywhere produced its fruits, as bitter as they are legitimate. A judiciary appointed by the executive, and holding its office during good behaviour, has given us such names as Marshall and Story and Kent and Gibson and Shaw and all that long, proud, legal record which those names recall of

the earlier and better days of American law: the judiciary elected by popular vote and for limited terms has ennobled our history with no names which posterity will not willingly let die, and has disgraced us with such proceedings as these just recorded."

Nor are the evils of the system only discernible in the New York Courts. Wherever it prevails the result is the same. In the State of Pennsylvania a different phase lately presented itself. A judge was bespattered with abuse by the leading papers opposed to his supposed political views, for the simple and only reason that he was supposed to be the candidate to some official position, which in fact he was not, without his detractors even taking the trouble apparently to ascertain if their supposition were correct.

We have not an elective judiciary, and may be glad of the fact—let it be the aim of those in authority to do *their* duty in appointing those who will, both personally and professionally, command the respect their position is entitled to, and then in the Courts of inferior as well as superior jurisdiction, there will be no fear that that respect will be wanting, or that the legacy happily left to us of an unstained and competent judiciary will be wanting.

CHAMBER APPLICATIONS IN THE COURT OF CHANCERY.

Among the bills introduced during the present session of the Legislature we notice one by Mr. Blake "to provide for the more satisfactory disposal of Chambers Applications in the Court of Chancery." It consists of four clauses and proposes to enact shortly that hereafter "the Judges Secretary shall have power to hear and dispose of all *ex parte* Chambers applications and of all other Chambers applications on which only one party appears, or which the parties consent to take before him;" that "every order made by the Judge's Secretary under the preceding clause shall have the same force and shall be subject to the like appeal as if made by a Judge in Chambers;" and that "the Judges of the Court or any two of them of whom the Chancellor shall be one, may make such orders as they shall deem expedient to effectuate the provisions of this Act, and may from time to time vary, add to, or repeal such orders."

The benefit of this enactment, or of one giving even more extended powers to the Judges' Secretary is unquestionable. At present the Secretary's power as a Chamber Judge is limited to hearing any applications which the parties may choose to bring before him, and then submitting the same with his opinion thereon to a Judge for his order; the order made being subject to be set aside or varied on an appeal in the first instance to a single Judge. The disadvantages of this mode of procedure consist in the almost inevitable delay caused by the Secretary conferring with a Judge upon the subject matter of the motion before an order can be made, and even if a Judge is at hand, which is not always the case, it is very unlikely that he can at once give his attention to business probably of less importance than that which he may then be engaged in. But it frequently happens that all the Judges are absent from town at the same time, and although such periods of absence are of limited duration, yet during that time Chamber business, so far as the disposal of any motion of other than minor importance is concerned, is practically at a stand still, and the advantage of having an officer such as the Judge's Secretary is to a certain extent neutralised.

In the next place, an appeal from an order made on a hearing before the Secretary must be made to a single Judge. It has been the usual practice—and undoubtedly the right practice—to bring on the appeal to be heard before the Judge with whom the Secretary conferred, otherwise we should have one Judge reviewing the decision of another. But if the Judge with whom the Secretary has to confer be absent, the appeal must lie vero until his return. Let us suppose however that the appeal has been heard and decided; the unsuccessful party if dissatisfied has still a right to rehear the order before three Judges and thus in the end he arrives, by a more circuitous and expensive route, at the same point which he would have gained more easily if the motion had been heard in the first instance by one of the Judges, or by some one possessing like powers. Mr. Blake's Act proposes to remedy these defects in the present system by conferring the Secretary the same power with respect to the applications specified as a Judge would have. We are not aware whether any alterations have been made in the bill as introduced, but it would have been advisable to have made some provision to prevent parties from taking advantage of the privilege given to

have applications disposed of by a Judge for the mere purpose of delay.

As regards the present incumbent of the former office the profession generally will we think be glad to leave with him the decision of their Chambers applications, and certainly none will regret a measure by which our already hard worked Chancery Judges would be relieved of a duty which must often encroach on their valuable time. The Act does not however deprive a party of his right to have his application heard before a Judge in the first instance if he so desires, while it shortens his road to an appeal to the three Judges in case he has brought on his motion before the Secretary and is dissatisfied with his decision.

The Act might perhaps go further and enact how the orders made by the Secretary should run (*i. e.* by inserting the name of a Judge or the Secretary in the margin,) and provide more explicitly for the manner of bringing on a motion before a Judge when a party desires that course; but no doubt the Judges can make provision for these and other matters of detail under the powers to make orders conferred by the third clause.

Altogether the Act is a good one, and we are pleased to see it introduced.

EXTRADITION.

We publish in another place the report of the decision, *The Queen* v. *Frank Reno and Charles Anderson*. This case, important in itself, has been impressed with additional interest and significance owing to the frightful end that has befallen these men, in common with the two brothers of Frank Reno. We read in the public papers these four men were murdered, for such is the only word that describes the act, in the gaol in which they were confined, in the State of Indiana, by a number of men calling themselves members of a "Vigilance Committee."

There is no reason to suppose, that we are aware of, that the authorities were in collusion with the men who committed this lawless act, except so far as they took no sufficient measures to protect their prisoners, though well aware of the existence of this "Vigilance Committee." The very thing that calls into existence bands of men who think it necessary to take the administration of criminal law into their own hands, is the incompetence or unwillingness of the authorities to carry out the laws they are appointed to maintain and administer.

It is no business of ours whether a neighbouring power permits, or, which is much the same thing, allows its citizens to hang suspected criminals before trial or after, except so far as it concerns our relations with that nation. The present case, unfortunately, concerns us in various ways, and not the least in this, that it will in a great measure cause a re-action in the feeling in favour of greater free trade in criminals, so to speak, between ourselves and the United States, which has been growing of late years. And it does concern us that persons extradited should receive a fair trial for the offence alleged upon this side of the line, otherwise there is no knowing to what improper and scandalous ends this treaty, so necessary for the well-being of both countries, might be prostituted, and how far the citizens of our country might be sacrificed to the occasional and unfortunately frequent lawlessness of our neighbours.

The act of the would-be conservers of the peace for the State of Indiana will of course be repudiated by the American government, and there we presume the matter will end. But the bloody stain upon the faith of that government will be no reason why we should not for the future do as we hitherto have done—obey the law of extradition as we find it. If a similar case were to arise to-morrow, with similar results to follow, our judges would be bound to and would without hesitation, though it might be with great reluctance, act without reference to the consequences; and the Governor General might possibly feel bound, in the exercise of his duty in carrying out the treaty, order the prisoners to be handed over to the United States authorities, to be dealt with according to the law of the land, or Judge Lynch, as circumstances, or the popularity or unpopularity of the crime or criminal might dictate. With reference to this part of the subject, we beg to call attention, to the words of the Chief Justice in the close of his judgment. These frightful excesses are also to be deplored, as they tend to beget a feeling of mistrust in the good faith of our neighbours, most destructive of good feeling, and likely to lead to the unfortunate result of limiting, instead of extending, the law affecting the interchange of criminals, as at present existing.

PRESENTATION TO JUDGE GOWAN.

It is with feelings of no ordinary pleasure that we record a very interesting ceremony that took place in Barrie, the County Town of Simcoe, immediately after the opening of the Courts on Tuesday, the 10th instant. We allude to the presentation to His Honor Judge Gowan of an address, by the united Bar and practitioners of the County, as a mark of their respect and esteem for his many eminent and kindly qualities. The address was beautifully engrossed on vellum, and was accompanied by a life-sized portrait in oil of the learned Judge. The words of the address speak for themselves:—

"*To His Honour* James Robert Gowan, *Judge of the County Court of the County of Simcoe.*

"Your Honour—The members of the Legal Profession in the County of Simcoe beg leave to congratulate you on the completion of your quarter of a century on the Bench, and render thanks to the Almighty disposer of events that you are still spared in the full strength and vigor of body and mind to continue, we earnestly hope for many years, to fill the office you have so long adorned.

"We feel that to your wise counsels and example are mainly due the existence of a Bar in this County, which will compare favourably with any in the Dominion, and that this result has been obtained without, in the smallest degree, fostering it at the expense of the public interests.

"As the head of the Legal Profession in the County, we have been gratified at hearing your name mentioned far and wide as occupying the foremost rank among County Judges, feeling that to earn such a position was alike honorable to yourself and creditable to the County and its Bar.

"We believe that to your firm and dignified administration of the Laws is mainly to be attributed the comparative freedom from crime, which we rejoice to know, distinguishes the County of Simcoe, and the respect for law and order which prevades all classes of our community.

"The profession have long felt that some public recognition of your extended and valuable services on the Bench, and your kindly spirit towards themselves, was due to you; and we now beg your acceptance, at our hands, of this life-sized painting of yourself, in your official chair and robes, as a mark of the respect and esteem in which you are held by us; and while making it, as we do, your own private property, we ask the favor that it may for a time be permitted to hang in the Court Room, so that all may have an opportunity of seeing it, and learning that the profession have paid tribute to your worth.

"Dated at Chambers, 8th December, A. D. 1868."

With the sentiments expressed in the above we most heartily concur, and congratulate the practitioners of the County of Simcoe that they have such an excellent Judge at their head, and that they know how to appreciate his worth.

We are the more pleased, as this gives us a legitimate opportunity of expressing our own sense of the very many obligations we are under to Judge Gowan for the valuable advice and assistance he has never failed to give us, when appealed to for the purpose, in the conduct of this Journal, advice especially valuable in that department with which he is so peculiarly conversant, and of which (we hope he will excuse our mentioning it,) we have largely availed ourselves. There are others, too, who will not easily forget the sound counsel and kind aid which, in numerous ways, has encouraged them to persevere to the attainment of a certain measure of success in their professional career.

The high stand Judge Gowan has always taken with reference to the dignity of the Bench, and his strict and regular administration of the law, has been remarked beyond the precincts of his own Courts, and would serve as an example for others to imitate. This address, moreover, of those who are best capable of forming an opinion of his merits, may be looked upon in a quarter where the aim would appear, from recent legislation, to be to lower rather than to elevate the tone of the Inferior Court Judiciary, as at least an incident to shew the possibility of destroying by rash changes much that has taken years of toil, endurance, self-control and judgment to build up.

But want of space, and not of inclination, prevents our speaking further on a subject of pleasure and interest to us. The learned Judge, in an impressive and eloquent manner, replied to the address, and concluded thus:—

"It was right that I should endeavor to discharge every duty faithfully and fearlessly: to create confidence in and to secure to suitors the full benefit of the several Courts over which I

preside, and to impress the public with the feeling of respect, never withheld from a Court of Justice, however limited its sphere, where order and decorum obtain.

"From the first I felt that this could be best done with the aid of an educated and honorable Bar, who would feel with me that we were all ministers of justice—all equally striving for the same great end. From the profession in this County I have always received the greatest aid in the discharge of my judicial duties, and it is to your cordial co-operation and support I am indebted for a measure of success that, unassisted and unsupported, I could scarcely have obtained.

"In gladly according to the Bar every privilege they could fairly claim: in fostering a right feeling in their intercourse with each other: in publicly combating prejudices against them, I have ever felt I was strictly within the line of duty; but I think you will acquit me of the weakness which fails to look for the inherent merits of a case in admiration for the skill and zeal of counsel.

It is most gratifying to me that you rightly possess the respect of the whole community, and I can with great truth say that honor, learning and ability, are characteristics of the legal profession in this district.

"At the age of twenty-five I entered with ardor on a work I liked, and though this judicial District was then, as now, the largest in Upper Canada, I felt equal to the labor, and I am able to say, through God's goodness to me, that during a period of nearly twenty-six years I have never been absent from the Superior Courts over which I preside, and, as to the Division Courts (except when on other duties at the instance of the Government) fifty days would cover all the occasions when a deputy acted for me. I have, I may be pardoned for saying, undergone labors and exposure of the most trying kind, as most of you know; but few are aware that those labors have left me with a seriously impaired constitution; yet I trust there is still in me some years of work, and nowhere could I be so happy in living and acting as amongst those whom I have known and valued so long.

"And now gentlemen need I say that I will preserve as a precious possession the address with which you have honored me. Your valuable gift will long after I have passed away, show the first Judge of this District as he looked after a quarter of a century of work. I would that it could portray with equal fidelity how deeply he was touched by this generous mark of your regard: how much invigorated for fresh exertion to try to deserve all that your kindness has associated with his name."

After the rising of the Court, the members of the profession present, which included, we believe, every practitioner in the County, together with some of the County officials and others, were sumptuously entertained at the hospitable residence of the learned Judge.

The third edition of Mr. Taylor's Consolidated Chancery Orders has just been issued from the press, and is now for sale by the publisher, Mr. Adam. It will be gladly welcomed by practitioners, and the sale will be rapid.

SELECTIONS.

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

It betokens a healthy sign of the public mind when institutions, high or low, lay or ecclesiastical, are brought to the bar of public opinion and judged according to their merits. In a free country nothing ought to be hidden from the gaze of the people. The only claim which, in modern times, an institution has to exist, is not that it is ancient and time-honoured, not even that it is harmless, but that it is the means of doing some positive good to the nation. And in order that it may be found out whether a given institution possesses the requisite qualification to be maintained, it should be laid bare before the public. We do not mean to assert that all institutions should be wantonly and recklessly, and at all times, made the subject of criticism. That would indeed be intolerable. Without doing the least good such criticism would only create disrespect in the minds of the people for institutions which, for the sake of the freedom of a country, must perforce be supported. It would alienate the well-affected from them, and thus materially interfere with, or even mar, their usefulness. But far different would be the effect of honestly examining into the operation of these institutions from time to time, and striking a balance between the good they have done and the evil they have consciously or unconsciously committed, or permitted to take place. By this means the efficiency of a system would be most successfully found out, and if there are any evils detected in it they would be speedily put a stop to. There is another and, if possible, a greater advantage which would result from such an examination. The system, instead of being shrouded in mystery, intelligible only to those who had made it the business of their lives to study it, and offering the greatest obstacles to the approach

of outsiders, would become more and more popular; and the more the benefits it conferred were understood and appreciated, the more it would rise in the estimation of the country, and the greater would be its chance of continued existence Bacon somewhere advises people to pause now and then in their avocations and carefully institute a mental examination of the work they have done. The same advice holds good with nations as with individuals. Self-examination, though rather scarce, is, when fairly conducted, an unmixed benefit, and the examination of national institutions, in a spirit of honest inquiry, cannot but be productive of unmixed good.

It is in this spirit of honest enquiry that we wish to draw the attention of our readers to the working of the Judicial Committee of the Privy Council. We are not about to say anything disrespectful of, or to reflect in an uncharitable way on, this august tribunal. Our object is only to see how this high court of appeal first originated, the purpose for which it originated, the way it has fulfilled its duties, and whether it cannot be improved so as to make it more efficient than it at present is. If the opinion we arrive at be adverse to the efficiency of the Committee, we must not be understood to question the propriety of its establishment, or to find fault with the foresight of the reformers who first brought it to life. Indeed, when we mention that the great and revered and venerable name of Brougham—the father of law reforms—is mixed up with the formation of the Committee, that the first suggestion for its establishment came from him, that he carried through Parliament the measure to which it owes its being, and that for a long time he presided at its sittings, it will be seen that every prospective care that could have been taken to make it work well was taken, and that the failure, if it has failed, must be owing to causes, which although they existed at this time of the formation, were not clearly discernible.

Previous to the passing of the Statute 2 and 3 Wm. IV. c. 92, there existed what used to be called the "Court of Delegates," established by 25 Henry VIII. c. 19, and continued by 8 Eliz. c. 5. The Act of Henry provided that for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the king's dominions, it should be lawful to the parties aggrieved to appeal to the king's majesty in the king's Court of Chancery; and that upon every such appeal a commission should be granted under the Great Seal to such persons as should be named by the king's highness, his heirs or successors, to hear and definitely determine such appeals and the causes concerning the same; and that the judgment and sentence of the commissioners in and upon any such appeal should be good and effectual and definitive, and that no further appeals should be made from the said commissioners for the same. The Court of Delegates was also charged with the duty of hearing appeals from the decision of the "Admirals' Court," but its judgments not having been made final, and great inconvenience having resulted from the prosecution of further appeals, an act (8 Eliz. c. 5) was passed whereby it was provided that every such judgment and sentence as should be given and pronounced in any civil and marine cause upon appeal lawfully to be made therein to the Queen's Majesty in Her Highness's Court of Chancery by such commissioners or delegates as should be nominated and appointed by Her Majesty, her heirs and successors, by commission under her hand and seal, should be final, and that no further appeal should be made from the said judgment or sentence definitive, or from the said commissioners or delegates for or in the same, any law, usage or custom to the contrary notwithstanding.

The Court of Delegates, thus made supreme, continued to discharge the duties entrusted to it vigilantly and well, but a reaction soon came, and its proceedings gave rise to discontent. Nor could it have been well otherwise. In those dark days of monarchical tyranny, cases the most remotely connected with politics used to give rise to dissensions, compared to which the angry feelings created by the Eyre Prosecution would appear perfectly tame. The king —we are talking of our kings after Elizabeth —was in a continual dread of losing his prerogatives, and rather than lose one of these, he used to take all the means in his power to get a decision favourable to the side he espoused. Thus, the commissioners were chosen, not with regard so much to their learning in civil and ecclesiastical law, not with regard so much to their standing at the Bar, but their known and avowed opinions in politics. The consequence was,—and it was quite natural under the circumstances—that most incompetent men were often selected to perform duties difficult and delicate, and that their judgments, however much they may have commended themselves to the king, created anything but satisfaction in the minds of the people. So intense was this feeling that, in spite of the two Acts we have referred to, the king was obliged "out of his royal favour, &c., &c., upon petition to him in council made for that purpose," to grant "a commission under the present seal, authorising the commissioners therein named to review the judgments and decrees of the High Court of Delegates, so appointed as aforesaid." But even this second court was found in the course of time to be objectionable. As the ideas of the Revolution of 1688 took root, people began to speculate how it was that, although in his majesty's Court of Common Law and Equity judges were made independent of the Crown, the Court of Delegates was left in its dependent position. The more the times advanced, the more the latter court appeared to be an anomaly, but as with most of the abuses under our "free and glorious constitution" it escaped the eyes of the governing classes of that time, and nothing was done to

put it out of sight until some time afterwards.

In the year 1828, Lord, then Mr. Brougham, in a powerful speech in the House of Commons, pointed out among other evils in our judicial system those resulting from the imperfect constitution of the Court of Delegates, and in August 7, 1832, a statute (2 & 3 Wm. IV. cap. 92.) entituled "an Act for Transferring the powers of the High Court of Delegates both in Ecclesiastical and Maritime Causes to his Majesty in Council" was passed to remedy them. This statute repealed the Acts of Henry and Elizabeth, and enacted that from February 1, 1833, the powers of the High Court of Delegates should be exercised by the king in council; and that no commission of review should be therefore granted. At the time these powers were transferred to the "King in council," this body—for it consisted only of a portion of the Privy Council—formed a most important Court of Appeal. In the language of Lord Brougham, in the speech already quoted,* they discharged "as momentous duties as any of the judges in this country, having to determine not only upon questions of colonial law in plantation cases, but also to sit as judges in the last resort of all prize causes. The point," Mr. Brougham went on to say, "to which I more particularly address myself on this head, is that they hear and decide upon all our plantation appeals. They are thus made the supreme judges in the last resort, over every one of our foreign settlements, whether situated in those immense territories which you possess in the east, where you and a trading company rule together over not less than seventy millions of subjects—or established among those rich and populous islands in the Indian Ocean, and which form the great Eastern Archipelago—and have their stations in those lands, part lying within the tropics, partly stretching towards the Pole, peopled by various castes, differing widely in habits, still more widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right, and excessively litigious, as all the children of the New World are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all questions growing out of so vast and varied a province is exercised by the Privy Council unaided and alone." Appeals in prize causes used to be heard by "certain persons, members of the Privy Council, together with others, being judges and barons of his majesty's Courts of Record at Westminster," and the Indian and Colonial Appeals before a Committee of his majesty's Privy Council, who used to make a report to his majesty in council, whereupon the general judgment or determination used to given by his majesty.†

This extensive jurisdiction thus vested in the Privy Council was not, as may be supposed, very satisfactorily exercised. The Privy Council did not then, as now, consist of many great lawyers, and the few that there were had other duties to discharge and could not attend to the Council. Causes of any constitutional importance used doubtless to receive a great deal of attention, and were soon decided in favour of the "powers that be," but those involving points of law, either from India or the Colonies, moved on at a very slow pace indeed. It was at last found necessary to improve the machinery of the court, and with that view Lord Brougham carried through Parliament a measure which afterwards became the Statute 3 & 4 Wm. IV. c 41. This Act enacted "that the president for the time being of his majesty's Privy Council, the Lord High Chancellor of Great Britain for the time being, and such of the members of his majesty's Privy Council as shall from time to time hold any of the offices following—that is to say, the office of Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain, Lord Chief Justice, or a Judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice, or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of Canterbury, Judge of the High Court of Admiralty, and Chief Judge of the Court of Bankruptcy,* and also all persons, members of his majesty's Privy Council, who shall have been presidents thereof, or held the office of Lord Chancellor of Great Britain, or shall have held any of the other offices hereinbefore mentioned, shall form a committee of his majesty's said Privy Council, and shall be styled the Judicial Committee of the Privy Council; provided, nevertheless, that it shall be lawful for his majesty from time to time, as, and when he shall think fit, by his sign manual, to appoint any two other persons, being Privy Councillors, to be members of the said Committee." Authority was given to the king to refer all matters he might think fit to the Judicial Committee, and to direct, by his Order in Council, that appeals from India and the Colonies should be heard by the Committee, and the Judicial Committee was provided with necessary powers to constitute it a regular Court of Justice. By Orders in Council, dated the 9th and 10th days of December, 1833, his majesty gave the necessary directions.

The first meeting of the Judicial Committee

* See Speeches of Henry Lord Brougham, Vol. II., p. 356, Edinburgh. A. and C. Black, 1838.

† See Preamble, 3 & 4 Wm. IV. c. 41

* To these have been added, by 5 Vict. c. 5 s. 24, the Vice-Chancellors appointed in pursuance of that Act; by the 14 & 15 Vict. c. 83, s. 15, the Judges of the Court of Appeal in Chancery, by 20 & 21 Vict. c. 77 & 115, the Judge of the Court of Probate. As to cases under the Church Discipline Act, 3 & 4 Vict. c. 86, s. 16 of that Statute enacts that Archbishops and Bishops, members of the Privy Council, should be members of the Judicial Committee, on all appeals under this Act. See McPherson's "Practice of the Judicial Committee. London. H. Sweet. 1860. We are indebted to Mr. McPherson's valuable book for the particulars of the statute cited above.

The Judicial Committee of the Privy Council.

for the hearing of appeals took place on November 27, 1833, and the Committee continued to discharge its duties satisfactorily enough for some time. Sir Edward Hyde East, Chief Justice of Calcutta, and Sir Alexander Johnstone, Chief Justice of Ceylon, both retired judges, were summoned to attend, and, as Mr. Knapp says, attended the meetings of the Judicial Committee, upon all appeals from the East Indies, and most of the other appeals.*

It does not appear from Mr. Knapp's book who were the judges who usually composed the Committee. The names of Mr. Justice Parke and the Vice-Chancellor of England, frequently occur, but there can be no doubt that four Privy Councillors† at least attended the sittings of the Committee. The business of the Committee was conducted under this statute of William IV. for about ten years, and it was then found that further legislation was necessary to facilitate the hearing of the appeals. On July 28, 1843, an Act was accordingly passed (6 & 7 Vict. c. 38), whereby it was enacted that appeals, &c., brought before the Committee might be heard by not less than three members of the Privy Council. This was a very important change in the constitution of the members of the Committee, for by the Statute of William IV., four Councillors formed a quorum, and we must presume that the reason of the alteration was the difficulty that then existed in finding the requisite number of judges to form the court. This Act further enacted that:

"Subject to such rules and regulations as may from time to time be made by the said judicial committee, with the approval of Her Majesty in Council, and save and in so much as the practice thereof may be varied by the said Acts of the reign of his majesty or by this Act, the said causes of appeal to Her Majesty in council shall be commenced, within the same times, and conducted in the same form and manner, and by the same persons and officers, as if appeals in the same causes had been made to the Queen in Chancery, the High Court of Admiralty in England, or the Lords Commissioners of Appeals in prize causes respectively."

On August 6, 1844, another act was passed to amend the Act of 3 & 4 Wm. c. 41, and to extend the jurisdiction and powers of the Committee. In 1851, a third Act was passed, to improve the administration of justice in the Judicial Committee, and a fourth Act, passed in 1853, completes the series of statutes relating to the Committee. The Act of 1851, enacts that the Judges of the Court of Appeal in Chancery, if Privy Councillors, shall be members of the Judicial Committee, and that no matter shall be heard by the latter, unless three members are present, exclusive of the Lord President. The Act of 1853 merely removes doubts as to the powers of the Registrar of the Privy Council to administer oaths, and provides for the performance of the duties of the Registrar in his absence.

Lord Brougham's chief object in establishing the Judicial Committee was to have judges in the Privy Council "who should be men of the largest legal and general information, accustomed to study other systems of law besides their own, and associated with lawyers who have practised or presided in Colonial Courts." He also "expected that the judges should be assisted by a Bar, limiting its practice for the most part to this Appeal Court; at any rate making it their principal object." And, most important of all, his idea was that "to counteract in some degree the delays necessarily arising from the distance of the courts below, and give ample time for patient inquiry into so dark and difficult matters, *the Court of Review should sit regularly and at all seasons.*"* Has the Committee realised Lord Brougham's object? Are Colonial judges and lawyers associated with the Committee? Is there a Bar "limiting its practice, for the most part, to this Appeal Court?" And, lastly, does the Committee—Brougham's Court of Review—sit regularly and at all seasons? Nay, constituted as the Committee is, is it possible for it to sit regularly and at all seasons "to counteract the delays, &c., &c.?" And, if not, what remedy had better be adopted to make it do so?

It will be observed that in the foregoing questions we have assumed that Brougham's ideal is the best possible ideal under the circumstances. We believe it is really so. A court of justice sitting regularly, and not by fits and starts; depending not upon migratory but stable judges, whose only duty should be to hear the cases coming before their own court, assisted by a Bar, the members of which should as a rule, confine their practice to the court, and conducting its business in a legal, proper, and decorous manner, appears to us to be the best court of justice that could be devised. And Brougham's court was nothing more or less than the court we have described. But to proceed.

It has been the good fortune of this Committee to be spoken highly of by very eminent authorities. Sir Roundell Palmer, speaking in the House of Commons on "The Administration of the Law," says:†

"Every one who knows how the business of the Judicial Committee of the Privy Council is administered will, I think, admit that the difficulties arising from having to deal with different laws have been by them most successfully grappled with, and that, upon the whole, a regard for substantial justice rather than mere technical accuracy has grown out of the fact that they have to administer justice in accordance with many different systems."

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*2 Knapp's Privy Council Reports, p. 4.

†In Mr. Edmumd F. Moore's continuation of Knapp's Reports, the names of the Vice-Chancellor, Mr. Justice Bosanquet, Baron Parke, and the Chief Judge of the Court of Bankruptcy frequently occur.

*See Speech quoted at p. 301, and Mr. McPherson's preface, p. vi. The italics are ours.

†Hansard, Vol 185, pp. 842—864. This speech was afterwards published in pamphlet form by Messrs. Butterworth sheaded "Our Judicial System."

Mr. McPherson, no mean authority, in the same way says that:—

"The Committee comprises men of eminence in every department of legal study, it sits regularly at stated periods, and every case which is ready to be heard is sure of an early and patient hearing."

We unhesitatingly subscribe to the eulogium passed upon the Committee. The ability and patience of the judges will bear the most favorable comparison with those of any other set of judges in the world. But we cannot help remarking that the constitution of the Committee is radically defective. With the exception of two retired Chief Justices of the Calcutta Supreme Court, the Committee does not now possess a single colonial judge.—It hears appeals from the courts of Canada, where the French law prevails, from those of British Guiana and Ceylon, where the Dutch law is administered, from the courts of the Channel Islands, where a peculiar system of their own exists, and yet no judge, at least no retired judge, from any one of these courts is a member of or assessor to the Judicial Committee. With regard to the Indian judges, too, it is to be remarked that the Supreme Courts having no jurisdiction out of the presidency towns, they, although well versed in the law which obtains in the interior of the country, have not that intimate knowledge of the people themselves, which a long practice in other places than the presidency towns can alone impart, and which, we confess, appears to us to be necessary to ensure a due administration of justice. Then, again, as to the Admiralty Appeals. There is only one member of the Committee who is well acquainted from long practice with Admiralty law—we mean, the Judge of the Court of Admiralty. He does not naturally sit to hear appeals from his own court, and they are therefore heard and determined by judges who, however theoretically they may know the law, have had no practical knowledge of it.

We repeat that we do not intend to throw any aspersions upon the learned judges who usually compose the Judicial Committee. Their decisions have been very satisfactory; and they have, we may presume, at immense pains to themselves, endeavoured to arrive at correct conclusions. But, we ask, is it possible for the colonists to have much confidence in the Committee? It may be said that the number of appeals that come from the colonies satisfactorily shows that the answer to our question must be emphatically in the affirmative. It would be very agreeable to us individually to believe that such was the case, but we are painfully aware of the fact that, whether a Court of Appeal is competent or not, suitors rush into appeal and take their chance of a good wind blowing in their favour, without stopping to consider whether the Appellate Court is likely to lay down sound principles of law or not. It is enough for them that they have lost, and that there is a Court of Appeal for them to take their case to. To them all law that stands against them is bad law, and they leave no stone unturned, if they possess the means, to get it upset. However much it may offend the *amour propre* of the profession, we cannot help thinking that the majority of the suitors who come before the courts are of the same stamp as George Eliot's "Mr. Tulliver," one of the cardinal points of whose belief was that the lawyer Wakem and all his compatriots were descended from "Old Harry." But suppose that the present constitution of the Committee is satisfactory; suppose that, although none of the members ever practised in French law, they are competent authorities to reverse the decisions of judges who have studied it from their youth upwards; suppose that the judgments of the Committee give satisfaction to the colonies—suppose all this, the fact still remains that the greatest possible difficulty is experience to form a court. The Committee only sit three times a year, that is to say, once after Hilary Term, once after Trinity Term, and once after Michaelmas. Its sittings last about a month each time, and in this short space of time it has to decide cases from all parts of the globe. But how is it formed? Sir Roundell Palmer in the speech already quoted, says, (p. 856)—

"Nothing could be more excellent than the materials I have described, *provided of course, that they can be brought to bear with sufficient regularity, convenience and despatch.* We have men of great learning, great experience, and important position. *But its judicial force is not such as to secure adequately the regularity of the administration of the Court.*

Take the case of the retired judges, &c. &c. &c. You cannot expect that retired judges, however mentally able and willing, should long be physically able to give a constant attention to duties of this description. They have come to a time of life, when they either already do, or soon must, require the rest which they have fairly earned. You cannot rely on more than occassional and precarious assistance, as a general rule, from that source. Then with regard to your present judges. The Chief Justices, and Chief Baron, and the Admiralty and Probate Judges are so occupied in their own courts, that their attendance is generally impracticable. The Lord Chancellor and the ex-Chancellors are wanted in the House of Lords. With regard to the other judges of the Court of Chancery, the Master of the Rolls, and the Lords Justices, they have been accustomed to give a good deal of their time to that court (Judicial Committee). In Lord Langdale's time the Rolls Court used to be shut up for long periods together, while his Lordship attended the Judicial Committee. That does not so often occur now; but the Lords Justices have been often withdrawn from their own court to attend the Judicial Committee."

Indeed, it may now be said that the Judicial Committee is kept on foot by such of the judges of the Court of Chancery as are members of the Privy Council. During the sittings after Trinity Term, 1868, the Lords Justices

and the Master of the Rolls alternately helped to make a court; and one week, when neither of these judges could attend, the Committee had to suspend its sittings. Excellent, then, as the materials are of which the Judicial Committee is made, they are not properly economised; and the consequence is that the Court does not possess that stable character which is so necessary to ensure success in the administration of justice. Its sittings, coustitutionally irregular, are made still more so by the changing and unstable position of the judges, and the court has consequently given rise to a great deal of dissatisfaction both in this country and abroad.

As for there being a regular Bar, confining its practices entirely to the work which come before the Committee, it is quite out of the qnestion. The Committee sits about three months or so a year, provided it can make a court, which, as we have seen, is no easy matter. The services of counsel are only required for these three months, and it is surely too much to expect that gentlemen would be satisfied with only the fees from three months work in court. Under these circumstances we have come to the conclusion that the principal aim for which Lord Brougham brought the Committee into existence has been defeated. With two exceptions there are no colonial judges members of the Committee; there is no regular Bar; the Committee does not sit regularly; and there is as much delay now in the determination of a case as ever there was before the Committee was established.

That a great deal of very serious inconvenience arises from this state of things we need hardly remark. The business of the Committee goes on so slowly that it is not at all uncommon to see a case standing for hearing for at least two sittings. Indian appeals especially seem to be peculiarly unfortunate. To be ripe for hearing they have to pass through a great many shoals and quicksands. In the first place, whether the suitors are rich or not, the agents in India seem to be so fond of having their clients' money in their hands that, unless hard pressed, they do not think of remitting funds to the solicitors here to carry on the appeals. Secondly, not a few of these appeals are held over the heads of the respondents, *in terrorem*, to induce them to come to an amicable settlement. When, however, all these dangers are passed, and they are set down for hearing, they go on unheeded for a long time. These appeals are now coming in in larger numbers than ever. Instead of four courts, there are now fifteen or sixteen courts in India from appeals which are brought before the Judicial Committee. Then there are the appeals from the various colonies, and to dispose of all this heavy business the suitors have to look to judges already overwhelmed with business in their own courts, and who have metaphorically speaking, no breathing time! Can anything be more anomalous than this? In this old country of ours we have a great many anomalies, but a more complete stumbling-block in the path of the "intelligent foreigner" than this Judicial Committee there does not exist. We expect our retired judges, without any further remuneration than their pension (and the pension is given for *past* services), to be retired judges only in name; and and in their old age, when they want rest, to learn new systems of law, and work as hard as a student reading for his examination! We expect our acting judges to interrupt the business of their own courts and to attend to duties which do not legitimately belong to them, and that for nothing all! An ex-cabinet minister when he gets a pension may retire from active life without being further troubled. An acting cabinet minister is expected to attend to the duties of his own department; but a retired judge must work on in a new field, and an acting judge must be prepared to be called away to new courts. True, through the self-denial of our judges, there has not yet arrived what we may call a regular dead-lock; true, the inconvenience to a great extent has been attendant upon the judges only; but for the due administration of justice the convenience of the judges must be, at least, as much consulted as that of the public; and it is nothing but the most suicidal and short-sighted policy "to work the willing horse to death."

It will be the dawn of the future 'golden ages' in this country when the reforms in our "judicial system" advocated by Sir Roundell Palmer are adopted. To curtail the House of Lords of its appellate jurisdiction, and to make only one court of appeal for all cases are obviously the best possible changes that could be desired in our administration of the law. But we are afraid it will be long, very long, before they are brought about. The fact that Sir Roundell Palmer's celebrated speech was not delivered until, by the upsetting of the Russell-Gladstone ministry, he had ceased to be the Attorney-General of England, shows how difficult the task is. It is, however, worthy of him, and we trust that he will not rest till the changes are accomplished. In the meantime, and to prevent further mischief with reference to the working of the Judicial Committee, we think some reforms are absolutely necessary. These need not change the character of the Committee, for, if Lord Brougham's idea is carried out in its entirety, all that is needful will be done. There are lawyers in England from all parts of the British empire—lawyers who have held high judicial positions in India and the colonies. If it were made worth their while they might be associated with English lawyers, and thus form a paid court for the purpose of getting through the business of the Committee.

We have no hesitation in saying that, unless all the judges of the Committee are adequately remunerated, there is not the slightest chance of the Committee becoming a regular and a stable Court of Appeal. To pay the judges is of course a matter of £. s. d., but we believe

the fees from the courts in India, where stamps used in proceedings are included, yield a surplus revenue to the Government; and we do not see why this revenue should not be drawn upon for the purpose of paying for, or at least contributing to, the expenses of the Judicial Committee. A court consisting of three English lawyers, two Indian Judges, and two colonial judges, would inspire confidence everywhere, and if it sits regularly, as it cannot but do if the members have no other courts to attend to, it will be one of the best courts in the country. Our article has become longer than we thought it would be, and we have therefore been obliged to hurry over the latter portion of it. We trust, however, we have said enough to arouse the serious attention of the legislature to the subject. "Delays are always dangerous," and none the less so in lawsuits. The Judicial Committee, therefore, should be invested with sufficient power to cause as little delay in disposing of the appeals before them as possible; for, as Mr. Gladstone put it, "Justice delayed is justice denied."—*Law Magazine.*

JUDICIAL DEBATE.

One of the peculiarities in the English system worthy of the attention of the Judicature Commission, and likely to meet with consideration in their report, is the difference between the administration of common law and equity in the number of the Judges constituting a court. The late addition to the Bench in the common law courts makes this difference more striking at the present than at any former time. It is true that this sixth Judge in each of the Queen's Bench, Exchequer, and Common Pleas, has not been created for the purpose of the legal business of the court as carried on between Crown and subject, and between subject and subject, but rather to give a legal character to an investigation which, although professedly judicial, was fast degenerating into a Parliamentary repetition of the struggle at at the hustings. Still, the additional Judge will be available for the trial of causes, particularly when they are of a difficult character. While this is the case in the common law courts, five of the equity courts are presided over by a single Judge, with the privilage, rarely exercised, of obtaining the aid of an assessor from the other bench; and the sixth equity court has only two Judges, who, however, may sit apart to determine a large part of the matters within their jurisdiction. On the whole there is presented the noteworthy feature of contrast in our judicature, that notwithstanding the two classes of courts have in many respects a concurrent jurisdiction, the one class consists of three courts with six Judges each, the other class of five courts with one Judge each, and another with two Judges, or, as the class may be described for some purposes, of seven courts with a single Judge each.

To which mode of constituting a court will the commissioners give the preference? When three or four judgments from the same bench are concurrent, the benefit generally in settling the law will be admitted. But it is not all gain. A chief of vigorous intellect and powerful mind will sometimes unduly sway a puisne of greater learning than steadfastness. Sometimes again, a successful politician, when promoted over the heads of better men, is content to pick up his law from his younger brothers, and clothe it with his own eloquence. Not every judgment which bears a show of unanimity is thought out on a well-balanced comparison of opinions, and a gradual reasoning away of differences by a common ascertainment of principles. Love of ease, too, will play its part. So it happens that in some instances the ostensible agreement of three or four is of no more intrinsic value than the decision of one. Not always on the bench is it true that *l'union fait la force.*

The strength of a court of a plurality of members may lie in its division as much as in its accord. Where the Judges differ and each delivers his opinion, based on principle and authority, a point of law is secured the fullest and soundest discussion of which it is capable. True, it has been discussed in like manner on the floor of the court, and it may be objected that the suitor craves judgment; but there is this difference that the debate by counsel is advocacy, the argument by the judge is conviction. But what is the practical fruit? Not that of a kind always acceptable to the suitor, but very acceptable to those whose future fortunes depend on the ultimate result; very acceptable to the community, in respect of whom a settlement of the law is of more importance than delay or harass to the particular litigant. In other words, contrariety of opinion in the inferior court prepares the way for a solemn and final determination by the court of appeal. That is one great service rendered by a court of numerous judges.

But our courts of appeal themselves consist of numerous judges. The Chancery Court of Appeal has three, though they are not bound to sit together, and do so only in the more difficult cases. The Exchequer Chamber and the House of Lords are notably courts of numerous members. But it would be a great mistake to apply them indiscriminately the theory of advantage from conflict of opinion on the Bench. To the full appeal court in Chancery, and the Exchequer Chamber the theory may be applied, for there remains the House of Lords to give certitude to the law. But to the House of Lords itself the theory has no application at all. Fortunately in the highest court of appeal in another jurisdiction, the Judicial Committee of the Privy Council, the observances of that council do not admit of publication of any debate by the members. It is otherwise in the House of Lords; and if, in such a body, anything could add to the inexpediency of indulging in the expression of an-

tagonistic views in matters in question judicially before them, it would be the public impression that there might naturally be some latent sparks of rivalry between law lords.

It may be doubted whether in any case the maintenance of opposing opinions by the members of a court of the last resort is politic, in the interest of jurisprudence. No doubt it sometimes occurs that the expression of difference is excusable, as where a Judge concurs in a decision by the others, not on a ground taken by them, and disputes that ground. Thus, lately, Lord Chelmsford, in *Shaw* v. *Gould*, which was the subject of a recent notice in this journal, on the point whether the forty days residence of a person in Scotland, sufficient to give the Scotch courts jurisdiction over him in ordinary causes, should extend to divorce, held the affirmative, in opposition to Lords Cranworth and Westbury, who grounded their judgment on the negative, but Lord Chelmsford concurred in judgment with them, because he thought there was collusion. It might have been better if, finding a sufficient ground in collusion, he had declined to express an unnecessary opinion on the jurisdiction. But the case which strongly exemplifies the unadvisedness of judicial debate in the Lords is *Routledge* v. *Low*, 18 L. T. Rep. N. S. 874. It was surely a sufficient occupation for the Lords to decide the important point arising on the facts before them, namely, that an alien friend is entitled to copyright in the Queen's dominions, if, while he is resident, though only temporarily, in any part of them, he first publishes in the United Kingdom. The Lord Chancellor, however, proceeded, beyond the bounds of the case to the dictum that, in his opinion, the protection of copyright was given to every author who published in the United Kingdom, wheresoever that author might be resident, or of whatsoever state he might be the subject. The intention of the Act of the 5 & 6 Vict. c. 45, was to obtain a benefit for people of this couutry by the publication to them of works of learning, of utility, of amusement. The benefit was obtained, in the opinion of the Legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work. That was, or might be, a benefit to the author, but it was a benefit given not for the sake of the author of the work, but for the sake of those to whom the work was communicated. The aim of the Legislature was to increase the common stock of literature of the country, and if that stock could be increased by the publication for the first time here of a new and valuable work composed by an alien, who never had been in the country, the Lord Chancellor saw nothing in the wording of the Act which prevented, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions, which should entitle such a person to the protection of the Act in return and compensation for the addition he had made to the literature of the country. In like manner, Lord Westbury, observing that the word "authors" was used in the statute without limitation or restriction, contended that it must, therefore, include every person who should be an author, unless from the rest of the statute sufficient grounds could be found for giving the term a limited signification. It was proposed to construe the Act as if it had declared in terms that the protection it afforded should extend to such authors only who were natural born subjects or to foreigners who might be within the allegiance of the Queen on the day of publication. But there was no such enactment in express terms, and no part of the Act had been pointed out as requiring that such a construction should be adopted. The Act appeared to have been dictated by a wise and liberal spirit, and in the same spirit it should be interpreted, adhering of course to the settled rules of legal construction. The preamble was, in Lord Westbury's opinion, quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seemed to contain an invitation to men of learning in every country to make the United Kingdom the place of first publication of their works; and an extended term of copyright throughout the British dominions was the reward of their so doing. So interpreted and applied, the Act was auxiliary to the advancement of learning in this country. The real conditions of obtaining its advantages was the first publication by the author of his works in the United Kingdom. Nothing rendered necessary his bodily presence there at the time, and Lord Westbury found it impossible to discover any reason why it should be required, or what it could add to the merits of the first publication.

This view of universal protection to books first published in the United Kingdom was contested by Lords Cranworth and Chelmsford. To Lord Cranworth there seemed to be reasons almost irresistible for thinking that the Act did not extend its benefits beyond persons resident in the Queen's dominions, whether aliens or natural born subjects, who, while resident, published their works in the United Kingdom. Lord Chelmsford doubted whether the opinion of the Lord Chancellor, which we have quoted, was well founded. If any stress was to be laid on the preamble of the statute it did not appear to him to differ very widely from that in the Statute of Anne. One of the objects proposed by the statute of Anne was to encourage "learned men to compose and write useful books." The object of the 5 & 6 Vict. was expressed to be "to afford greater encouragement to the production of literary works of lasting benefit to the world." If, therefore, the Statute of Anne did not confer the privilege of copyright upon an alien publisher residing abroad (which, after the case of *Jefferys* v. *Boosey*, it must be taken not to have done), Lord Chelmsford could not find

anything in the 5 & 6 Vict. which appeared to him to warrant the extension of its benefits to such a publisher.

Now this question whether the Copyright Act has for its object the benefit of the reading public in the Queen's dominions by securing first publication in the United Kingdom, irrespectively of the circumstances of the author, or whether the place of residence of the author at the time of the first publication is also to be regarded, is a very interesting subject of discussion when it does not arise in a cause, and a very weighty subject for decision when it does arise. But what possible advantage can there be in a premature debate on the point in a court of final resort? As respects that court itself the effect must be to prejudice judgment when the point shall actually arise, and be specially argued. It is not too much to say that at least the Lord Chancellor and Lord Westbury have, by the strong expression of their opinions before the House, disqualified themselves for the unbiassed hearing of such an argument. To inferior courts the lords should be a clear and shining light; but the result of the division on the Lord Chancellor's dictum in *Routledge* v. *Low* can only be to perplex and confuse all Chancery and Common Law judges. Directly the point of the author's residence at the time of first publication arises in a case where he is resident abroad comes before an inferior tribunal, the Court must say, "take it to the House of Lords, how can we give you any judgment that shall command your assent or respect when the court of final appeal is divided against itself in this matter?" The pernicious consequences which a very little reflection suggests as likely to follow debates on dicta among the law lords, sitting in their court, induces us to urge them to abandon such a course for the future. If any one of them is so little careful of results as to gratify an inclination for speculative law, let the responsibility rest with him, and let those who follow him hold their peace, and confine themselves to the law necessary to be settled for a decision of the case under adjudication. Otherwise a final appeal tribunal instead of fulfilling its high office of settling the law, becomes a dangerous fountain of settled doubt upon the law.—*The Law Times.*

THE LAWS OF EXTRADITION.

The select committee appointed to inquire into the state of our treaty relations with foreign Governments regarding extradition, with a view to the adoption of a more permanent and uniform policy on the subject, have agreed to the following report, which was issued recently:—"That it is desirable that greater facilities should be given than now exist for making arrangements with foreign States for the surrender to them of persons accused of the commission of crimes in the territory of such States respectively, and who have escaped to this country, and for the surrender by them to the Government of the United Kingdom of persons accused of crimes, who have escaped to their territories from this country. That the list of crimes which should form the subject of extradition between this country and foreign countries requires to be carefully considered, but might, with advantage to the public interests, be made more comprehensive than the list of crimes enumerated in the only three treaties of extradition now in force between the United Kingdom and other countries —namely, France, the United States, and Denmark. That a general Act of Parliament should be passed, enabling Her Majesty, by Order in Council, to declare that persons accused, upon proper and duly authenticated *primâ facie* evidence, of the commission of any of the crimes to be enumerated in such Act should be surrendered to any foreign Government, within whose jurisdiction such crime is alleged to have been committed, and with which arrangements have been made for the extradition of persons accused of crimes; provided that the evidence should with the exceptions mentioned in the 5 & 6 Vict. c. 75, s. 2, and the 29 & 30 Vict. c. 121, be such as would justify the committal of the offender for trial if the crime had been committed in England. That every arrangement should be required by the Act of Parliament that every such arrangement should expressly except from the liability to extradition such persons as are accused of crimes which are deemed, by the party to arrangement of whom the surrender is demanded, to be of a political charcter; provided that any person accused of a crime which is deemed, by the party to the arrangement of whom the surrender is demanded to constitute assassination, or an attempt to assassinate, shall not be included in this exception. That copies of every such arrangement, and of the Order in Council which embodies it, shall be laid before either House of Parliament, within six weeks of the issue of such order, if Parliament, be then sitting, or if it be not then sitting, then within six weeks of the next meeting of Parliament. That every such arrangement should contain an express stipulation that no person surrendered, shall be put on his trial, or detained within the state to which he is surrendered, for any crime committed previous to his surrender, other than that on account of which he has been surrendered, without having been previously restored, or having had an opportunity of returning to the territory of the state making the surrender. That it be one condition of such arrangements, on the part of the United Kingdom, with respect to any prisoner who shall be ordered by competent authority to be surrendered to any foreign government, that he be remanded to safe custody for a limited period—say fifteen days—before final surrender, and he be informed, by the authority making such order and remand, that it is competent for him to apply in the meantime for a writ of *habeas corpus*. That upon the hearing of the case on *habeas corpus* it shall

be open to the accused to question the *bona fides* of the demand for his extradition, upon the ground that his surrender has, in fact, been sought for political reasons. That all legal proceedings necessary for the surrender of an offender by the United Kingdom, on account of a crime committed in a foreign country, should originate in an application before the principal metropolitan police-court. That the Act the 29 & 30 Vict. c. 121, which expires this year, making certain provisions with respect to the admission of judicial or official documents, or copies thereof, in evidence against persons accused of crime, in accordance with the extradition treaties now in force, should be further temporarily continued."—*The Law Times.*

THE LATE MR. COMMISSIONER GOULBURN.

Baily's Magazine for the month has this passing notice in the obituary, "Mr. Commissioner Goulburn has also gone the way of all flesh, and we may remark that when in the Guards, and in the zenith of his glory, he had a long string of horses under the care of George Boast at Burton-on-the-Hill, of which if our memory serve us correctly, Milo, Romeo, and Grimaldi were the best. He was a most kind-hearted man, and had a host of friends." The writer's memory certainly does serve him wonderfully well, for, according to the *Calendars*, it is just sixty years since Grimaldi, Romeo & Co. were running! But it is not as a turfite that the learned serjeant will be best remembered as a sportsman. During the time that the famous John Corbet hunted Warwickshire, he was one of the leading members of the Hunt-Club at Stratford-on-Avon, and in a poem he wrote on a run with these hounds he thus introduces himself:—

In a mode rather different came Goulburn the Bard,
Who, a long time disdaining the cry of Hold hard!
Over hedges and ditches was thoughtlessly fanning,
Resolved at all hazards to follow Bob Canning;
To accomplish which end he kept on at a score
That his five-year-old nag felt a sensible bore;
So at Sworford, unable to climb up the hill,
At a nasty ox-stile stood obligingly still;
There left him in plight not a little distressing,
The breed of Arabians most fervently blessing!

Some two or three years after the *New Sporting Magazine* had been started, and when it was in full swing, a hotel-keeper at Leamington brought an action of libel against the publishers for something that had been said in the work about his house. Serjeant Goulburn as one of the then leaders of the Midland Circuit, was for the plaintiff, and Mr. Hill, afterwards Recorder of Birmingham, for the defendants. The line of the latter was to laugh the thing out of court, and in furtherance of this Mr Hill, with apparent carelessness or chance, took up a volume of the magazine from some others before him, with the remark that "I should not be surprised if these impertinent fellows had been saying something about my learned friend himself." And then, after turning over a few pages, he read the subjoined passage to the immense amusement of the judge, jury, and public, heightened by the protestations of the serjeant, who vainly attempted to interfere: "The Serjeant Goulburn of the present day, brother to the ex-minister of that name was a conspicuous character in Warwickshire, in Mr. Corbet's time. He is a better lawyer than he was a sportsman, but he was a valuable acquisition to the Stratford-on-Avon hunt. They were the days of his youth, and, nothing loth, he yielded to the allurements which England holds out to that delight-giving period. Like the great Lord Erskine, he had been a soldier and a sailor. He had race-horses and hunters, and so had others. But he had—what but few possess—*the talent to amuse beyond his fellows.* In short he was the charm of society wheresoever he entered into it; for, although by nature a satirist, he sought but to amuse, and if pain was given the remedy was at hand by the same means by which the wound was inflicted. A poem written by him, called 'Epwell Hunt" descriptive of a run he saw with Mr. Corbet's hounds—somewhat in the style of the famous Billesdon Coplow song—was an admirable performance as a real picture of the passing scene, and, if I am not much mistaken, will outlive the best of his judicial orations." "No, no," said Mr. Hill, closing the volume, "not outlive them, but they will descend hand in hand to posterity together." This description was, of course, from the pen of Nimrod, who had also been a member of the Stratford Club.

It is said here that Mr. Goulburn was by nature a satirist; and, undoubtedly, beyond the judicial orations, the best thing he ever produced was a satirical poem called the Pursuits of Fashion, wherein "The Fine Man, or Buck of the First Set," is clearly sketched from Beau Brummell; while the author's own experiences must have been of considerable assistance in portraying "The Coffee House Cornet, or Buck of the Second Set," as well as in his study of "The Knowing Man, or Buck of the Turf." The work has long been out of print, and, indeed, was intended in the first instance only for private circulation, so that we may the more readily give a taste or two of its quality. Here is some very hard hitting anent the turf:

Or, make ye health and happiness your care?
Avoid Newmarket's soil, they grow not there.
When all your hopes, mayhap your future bread,
Depend upon a jockey's heart or head;
When merest chance, a bolt, a cross, or swerve,
Has power to place in torture every nerve;
When perspiration's drops bedew the cheek,
And scarce the mouth retains its power to speak;
When from the socket starts the anxious eye,
And every pulse beats high in agony.
Let those who thus have felt—let them confess,
Can health be then enjoyed? or happiness?
But you *may* win—what then, unthinking boy,
You shout, you halloa, and conceive it joy.
Such joy the footpad feels when quirk or flaw
Have saved him from the vengeance of the law.
Like yours, his present bliss is rendered vain,
By hopes of better plunder, greater gain;
Like you, resolving headlong to pursue
A something not attained, yet still in view.

This was written sixty years back, but it reads as fresh as if brought out only yesterday. Here is a companion picture of the then "newly established club at Borbury:"

A vast assemblage this, where boys from school
In jockey garb first came to play the fool—
Oxonian thickheads, eminently dense,
Who yearly met to prove their want of sense,
And give their steeds that whipcord—truant elves!—
Which wiser nature destined for themselves.
And now where every blockhead bends his back,
Like Puss resisting Pompey's rough attack,
To spur the sides of some ill-fated hack;
Where giant zanies, liliputian peers,
Some scarcely breeched and some advanced in years,
Militia bucks and cornets of dragoons
Like showman habited, or stage buffoons,
With wasted carcases their rips bestride,
And puff, perspire, and pant, and think they ride.

How admirable it all is! as we might go on quoting column on column, although scarcely with the good serjeant's leave, for later in life he took a very serious turn, and no doubt would have blotted out from memory the scenes he drew so well, and in which he himself had shone so brilliantly.—*Field.*

LEGAL LADIES.

We should very much like to know what the gentlemen who carry on the business of law publishers in Bell-yard and thereabouts would say—and we may add ourselves and our contemporaries—if they found a lady setting herself up in rivalry against them, and using all her energies to get the support of the Bench and the Bar. America affords us evidence that there is at least a possibility if not a probability of such a catastrophe.

With courtesy and every respect we have thus publicly to acknowledge the receipt of a circular from Myra Bradwell, which circular announces that "the undersigned, having long seen the want of a legal publication in the West, will, on, &c., issue the first number of a weekly paper, to be called the *Chicago Legal News.*"

"The *News*," we are further told, "will be issued on Saturday of each week, will contain four pages, 12 by 17 inches, of four columns each, and be devoted to legal information, general news, the publication of new and important decisions, and of other matters useful to the practising lawyer or man of business. It will give abstracts of the points decided in our local courts comment, freely but fairly upon the conduct of our judges, the members of the Bar, officers of court, members of Congress and our State Legislature in their administration of public affairs. The summary of events in each number will contain items of general news, a notice of recent law publications, changes in the rule or practice of our local courts, admissions to the Bar, marriages and deaths of its members. The undersigned has the promised aid of some of the best and ablest men of the Bench and Bar of Illinios, who will furnish original contributions upon the various legal subjects. A portion of each number will be exclusively devoted to legal notices and advertisments."

This is business-like and grammatical, but then follows this extraordinary sentence: "The *News* will be enlarged from time to time as the liberal patronage of the public will enable her to do." We do not desire to be hypercritical, but for the honour of the Profession even in Chicago we trust that Miss Bradwell will not be tempted to write her own articles.

We had written the above when we opened a slip of "Opinions of the press," which accompanies the prospectus, and to our amazement we find that the lady is not Miss but Mrs. Myra Bradwell, being no less a person than the wife of the Hon. J. B. Bradwell, Judge of the County Court of Cook County. The *Chicago Republican* calls her "the wife of our popular County Court Judge." The *Janesville Gazette* refers to her as "the talented wife of Judge Bradwell." The *Chicago Evening Journal* says: "To those who are not acquainted with Mrs. Bradwell, we should say she is a lady of ability and determination, and will carry through to the end whatever she may undertake. We most heartily wish her abundant encouragement and success."

We echo the sentiment, simply recommending this talented and enterprising lady to take a little pains in the construction of her sentences.

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter to the Court.*)

The Queen v. Frank Reno and Charles Anderson.

Extradition—Ashburton Treaty—31 Vic. cap. 94—Police Magistrates—29 Vic. cap. 20—Habeas Corpus—Return to.

The express car of a railway train on one of the roads in one of the United States of America was broken into and plundered by five or more men, two or three of whom fired at the conductor, who was endeavouring to stop them as they were moving off with the engine, &c. The conductor was at the time about eight feet from the person who fired the first shot, and the ball passed through his coat. This person was sworn to be a brother of the prisoner Reno. The express messenger swore to the identity of the prisoners, and as to the identity of the person who fired the first shot. The prisoners were arrested in Canada, at the instance of the express company, and demanded for extradition by the United States authorities. They were arrested and detained by two warrants of commitment, the second being intended to cover defects in the first. The prisoners offered evidence on their examination to prove an *alibi*. They were afterwards brought before the Chief Justice on a writ of *habeas corpus*.

Held, 1. That the words in the first warrant, "did feloniously shoot at, &c., with intent to kill and murder, &c.," are included in the words used in the Extradition Treaty and Act, which speaks of an "assault with an intent to commit murder," and therefore the warrant was not bad on that ground.

2. That a statement by the gaoler, as a return to a writ of *habeas corpus*, that no funds had been provided to pay the expense of bringing the prisoner before the judge, was in fact no return to the writ.

3. That the return must be produced and read before the judge previous to its being filed.

4. That it is not indispensable that the authority of the magistrate should be shown on the face of a warrant of commitment; and where the crime has been committed in a foreign country, and the committing magistrate has (as Mr. McMicken had in this case) jurisdiction in every

county in Ontario, the warrant is not bad, though dated at Toronto, the county mentioned in the margin being York, but directed to the constables, &c., of the county of Essex, and being signed by the police magistrate as such for the county of Essex.

5. That 28 Vic. c. 20, authorizing the Governor to appoint police magistrates relates to the administration of justice, and is within the powers of the Legislature of Ontario, and is still in force.
6. That under 31 Vic. cap. 94, the last Extradition Act, all that the committing magistrate or the court or a judge has to do is to determine whether the evidence of criminality would, according to the laws of Ontario, justify the apprehension and committal for trial of the accused if the crime had been committed therein, and that such decision, if adverse to the prisoner, does not conclude him, as the question of extradition itself or discharge exclusively rests with the Governor-General.
7. That under the circumstances of this case, there was sufficient *prima facie* evidence of the criminality of the prisoners to warrant a refusal to discharge them, and that there was evidence to go to a jury to lead to the conclusion that the intent of the prisoners was, at the time of the shooting, to commit murder.
8. That evidence offered to a magistrate by a prisoner, on an examination of this kind, by way of answer to a strong *prima facie* case, may perhaps properly be taken, but would not justify the magistrate in discharging the prisoner. And *quære*, whether it was not the intention of 31 Vic. to transfer to the Governor exclusively the consideration of all the evidence, that he might determine whether the prisoner should be delivered up. The magistrate cannot weigh conflicting evidence to try whether the prisoner is guilty of the crime charged.
9. The duty of the court or a judge on a *habias corpus* in such cases, is to determine on the legal sufficiency of the commitment, and to review the magistrate's decision as to there being sufficient evidence of criminality.

[Chambers, October 4, 1868.]

A writ of *habeas corpus ad subjiciendum*, under the statute of Car. II., was issued to the gaoler of the county of Essex.

The writ was issued and tested in vacation, returnable immediately before the Chief Justice of the Court of Queen's Bench, or of the Common Pleas, or any Judge of either of those Courts, presiding in Chambers at Toronto.

To this writ the gaoler made the following return:

"I, (&c) do hereby certify that I hold and detain the said Charles Anderson and Frank Reno, in the within writ named, under the warrant of commitment of Gilbert McMicken, Esq., police magistrate in and for the said county of Essex, and issued by him on the 14th day of September, 1868, and now annexed to the within writ, and under no other warrant or writ, and for no other cause or matter whatsoever; and I am ready to produce the bodies of the said Chas. Anderson and Frank Reno, as I am within commanded, but I am unable to convey them to the city of Toronto, as within commanded, because I have no means whereby to pay the expense of such conveyance; and having applied to the said prisoners and their counsel, they refuse to furnish me with such means; and having applied to the Treasurer of the said county of Essex, I am informed that there are no funds applicable to the said service; and therefore I most respectfully submit to this honorable Court that I am unable to obey the command of the said writ."

The writ, with this return attached to it, together with the original warrant therein mentioned, were sent by post to the Clerk of the Crown and Pleas of the Court of Queen's Bench at Toronto, who wrote on the back of the return, "Received and filed the 26th September, 1868," and signed his name thereto It was then handed to the Clerk in Chambers.

After this, Mr. Justice John Wilson, sitting in Chambers, made an order, allowing all the foregoing papers to be withdrawn, and that the gaoler might make such a return as the papers in his possession warranted.

On Thursday, October 1st, the gaoler brought the two prisoners before the Chief Justice of Ontario, in Chambers at Osgoode Hall, and on his behalf the writ of *habeas corpus* was put in, with the foregoing return annexed, and another return as follows:

"I, (&c.,) do certify and return to our Sovereign Lady the Queen, that before the coming to me of the said writ, that is to say, on the 14th day of September, 1868, Charles Anderson and Frank Reno, in the said writ also named, were severally committed to my custody by virtue of a certain warrant of commitment, the tenor of which is as follows:—

"Province of Ontario, County of Essex, *to wit:*

"To all or any of the constables or other peace officers in the said county, at Sandwich, in the said County of Essex, and to the keeper of the Common Gaol of the County of Essex, at Sandwich, in the said County of Essex:

"Whereas Frank Reno and Charles Anderson, late of the town of Marshfield, in the County of Scott, and State of Indiana, one of the United States of America, were this day charged before me, Police Magistrate in and for the County of Essex, amongst other Counties, appointed under and by virtue of the Act of the Parliament of Canada, 28th Victoria, ch. 20, intituled 'An Act respecting Police Magistrates,' on the oath of Lee C. Weir and others, for that they, the said Frank Reno and Charles Anderson, on the 22nd day of May, 1868, within the jurisdiction of the United States of America, to wit, at the town of Marshfield, in the County of Scott, and State of Indiana, one of the United States of America, did feloniously shoot at Americus Whedon, with intent in so doing, him the said Americus Whedon, to feloniously, wilfully, and of their malice aforethought to kill and murder, and that in consequence of the said offence, the said Frank Reno and Charles Anderson have fled from the said State of Indiana, and are now residing in the town of Windsor, in the County of Essex aforesaid. And whereas such evidence as, according to the laws of this Province, would justify the apprehension and committal for trial of the said Frank Reno and Charles Anderson, if the crime of which they are accused had been committed in this Province, has been adduced before me:

"These are, therefore, to command you, the said constables or peace officers, or any of you, to take the said Frank Reno and Charles Anderson, and them safely convey to the common gaol at Sandwich, in the County of Essex aforesaid, and there deliver them to the keeper thereof, together with this precept.

"And I do hereby command you, the said keeper of the said Common Gaol, to receive the said Frank Reno and Charles Anderson into your custody in the said Common Gaol, and there safely to keep them, until they shall be thence delivered by a warrant under the hand and seal of His Excellency the Governor General, ordering the said Frank Reno and Charles An-

derson, committed as aforesaid, to be delivered to the person or persons authorized to receive the said Frank Reno and Charles Anderson, on behalf of the United States, or until discharged according to law.

"Given," &c., "this 14th September, at the town of Sandwich, in the county aforesaid.

[L. S.] "Signed, G. McMICKEN,
"*Police Magistrate for the County of Essex.*"

"And that afterwards, and whilst the said Frank Reno and Charles Anderson were respectively so in my custody, that is to say, on the twenty-eighth day of September, 1868, the said G. McMicken caused to be delivered to me a certain other warrant of commitment, the tenor of which is as follows:

"PROVINCE OF ONTARIO, COUNTY OF YORK' *to wit:*

"To all or any of the constables or other peace officers in the County of Essex and Province aforesaid, at Sandwich, in the said County of Essex, and to the keeper of the common gaol of the County of Essex, at Sandwich, in the said County of Essex:

"Whereas Frank Reno and Charles Anderson, late of the town of Marshfield, in the County of Scott and State of Indiana, one of the United States of America, were charged before me on the 14th day of September, 1868 being Police Magistrate in and for the said County of Essex, appointed under an Act of the Parliament of Canada, 28th Victoria, ch. 20, intituled 'An Act respecting Police Magistrates,' on the oath of Lee C. Weir and others, for that they, the said Frank Reno and Charles Anderson, on the 22nd day of May, in the year of our Lord one thousand eight hundred and sixty-eight, within the jurisdiction of the United States of America, to wit, at the town of Marshfield, in the County of Scott and State of Indiana, one of the said United States of America, did feloniously assault Americus Whedon, with intent, in so doing, him, the said Americus Whedon, feloniously, wilfully, and of their malice aforethought, to kill and murder; and that in consequence of the said offence, the said Frank Reno and Charles Anderson have fled from the said State of Indiana, and are now residing at the town of Windsor, in the County of Essex aforesaid.

"And whereas such evidence as, according to the law of this Province, would justify the apprehension and committal for trial of the said Frank Reno and Charles Anderson, if the crime of which they are accused had been committed in this Province, has been adduced before me:

"These are, therefore, to command you, the said Constables or Peace Officers, or any of you, to take the said Frank Reno and Charles Anderson, and them safely convey to the Common Gaol at Sandwich, in the County of Essex aforesaid, and there deliver them to the Keeper thereof, together with this precept.

"And I do hereby command you, the said Keeper of the said Common Gaol, to receive the said Frank Reno and Charles Anderson into your custody in the said Common Gaol, and there safely to keep them, until they shall be delivered by a warrant under the hand and seal of His Excellency the Governor General, ordering the said Frank Reno and Charles Anderson to be delivered to the person or persons authorized to receive the said Frank Reno and Charles Anderson, on behalf of the United States, or until discharged according to law.

"Given," &c., [concluding as the former warrant, but dated 28th September, 1868] "at the City of Toronto, in the County of York."

"And that they, the said Frank Reno and Charles Anderson, in the first warrant mentioned, are the same Frank Reno and Charles Anderson as in the second warrant mentioned.

"And these are the causes of detaining the said Frank Reno and Charles Anderson, whose bodies I have here ready, as by the said writ I am commanded."

The original warrant, a copy of which is the first of the two annexed to this second return, was annexed to the writ and the first return set out above.

A writ of *certiorari* was also issued, dated the 26th September, 1868, and directed to Gilbert McMicken, Esq., Police Magistrate, the committing Justice, by whose authority Charles Anderson and Frank Reno were confined, to certify and return forthwith "the evidence, depositions, and other proceedings had or taken, touching or concerning such confinement."

This writ was duly returned with "the evidence," &c., as required.

The information was laid against the two prisoners on the 19th August, 1868, stating that the informant, Lee C. Weir, had reason to believe, and did verily believe, that Frank Reno and Charles Anderson, on the 22nd May, 1868, at the town of Marshfield, in the County of Scott, in the State of Indiana, one of the United States of America, "did feloniously shoot at Americus Whedon, with intent in so doing, him, the said Americus Whedon, feloniously, wilfully and of their malice aforethought, to kill and murder," and in consequence of that offence had fled, and then were residing at the town of Windsor, in the County of Essex.

It appeared that upon this information the prisoners were brought before the Police Magistrate, and the depositions of Lee C. Weir, Americus Whedon, Thomas Griffin Harkins, George W. Fletcher and Samuel A. Jones, against the prisoners were taken.

It was sworn that, on the 22nd May last, an express train, made up of engine, tender, express car, baggage car, and two couches, was run on the Jeffersonville, Madison and Indianapolis railway, in the State of Indiana, leaving Jeffersonville at 9½ p.m. The express car carried boxes of goods and packages of money, which latter were in a safe. The train, on reaching Marshfield water-station, stopped to take in water. There is a switch there. There is also an old abandoned saw-mill, about thirty yards from the water tank, and three or four houses within about two hundred yards, but not all inhabited. The train stopped there about eleven o'clock, and almost immediately several men (six or seven) were seen going to the express car. One disconnected the bell-rope, another uncoupled the baggage and express cars. Whedon, the conductor, shouted to them, and the man who disconnected the bell-rope fired at him, the ball passing through the conductor's coat, and the engine, with the express car, moved off, leaving

the other part of the train on the track. Two other shots were fired from the end of the express car, one by the man who pulled out the coupling pin, the other by the man who had fired the first shot. Some of these shots were from a revolver. The conductor was, as he thought, about eight feet distant when the first shot was fired, fifteen feet at the second, and thirty feet at the last. He fired three shots in return. He recognized the first man who fired as one Simeon Reno, a brother of the prisoner Frank, whom he pointed out at this examination. The family residence of the Renos was near the village of Seymour, which is about eighteen miles north of Marshfield. Shortly after the engine and the express car had moved off the door at the rear of the latter was burst open. Harkins, the express messenger, states that three men entered at once, and immediately afterwards he lost consciousness—the last he could remember was the flash of a pistol, or ball of fire, before his eyes. He gave no other explanation, and added that on the Sunday following (the 22nd of May was on Friday) he recovered consciousness. By other testimony it appears that both front and rear doors of the express car were burst open, and pieces of paper and broken packages were scattered round in the car. The conductor telegraphed to various places, and an engine was sent to him, with which he took on the residue of his train to Seymour, where he found the express car and the engine which had been taken away.

Harkins was found about 250 yards from where the engine and express car had been taken, lying between two trucks, "doubled up." He was insensible, and had a cut on the back of his head. From the place where he seemed to have first struck the ground he appeared to have slipped about ten feet. In the opinion of the conductor, the engine taken away must, at the place where Harkins was found, have been going at the rate of thirty miles an hour.

Harkins states that he did not know either of the three men who burst into the car, but that the two prisoners are two of them: that he recognized them in the Dominion Saloon at Windsor, and there pointed them out to Mr. Weir. On cross-examination he gave a description of the light on the car, viz.: a lamp placed about five feet high on the left hand side, entering from the rear, and behind him as he looked towards the men entering. He stated that he has since seen Simeon Reno, and had recognized him also.

McMichael and *O'Connor* for the prisoners, contended:

1. As to the matters of fact that there are inconsistencies, and strong improbabilities in the depositions (particularly in those of the express messenger), which render it unjust, or at least indiscreet to rely and act upon them; and that they are proved to be untrue by the mass of testimony adduced to prove, and which does prove an *alibi*.

2. As to the matters of law, they insisted that as there is no direct proof that either of these prisoners actually did shoot at the conductor, although they went in company with the man who did shoot, and with others to steal, there is no reason whatever for inferring that they went intending to commit murder: that the act of shooting at the conductor with intent to murder, being no part of the original design, and being a distinct felony according to our law, was an act for which only the actual agent or agents were responsible, and that there was no proof that the prisoners concurred in that act, or in the intent with which it is charged to have been done; that the intent may just as well have been to maim, disable, or do grevious bodily harm to the conductor as to murder him, and therefore would not sustain the charge stated in the committal, *i. e.*, shooting at, with intent to murder, which is the only intent contained in the treaty: that the first warrant does not contain a description of an offence as designated in the treaty, by the words, "Assault with intent to commit murder:" that the second return made by the gaoler was null, as he had made one return already to which the first commitment was annexed; that the second warrant of commitment was void, being made after the writ of *habeas corpus* was issued, and this first return had been made and had been received and marked filed by Mr. Dalton, the Clerk of the Crown and Pleas for the Court of Queen's Bench (the Court under whose seal the *habeas corpus* issued), to whom the gaoler had transmitted the writ and return by post: that this second warrant was also informal—the venue in the margin being in the County of York—and at the end, the commitment being stated to be "Given," &c,, at the City of Toronto, in the County of York," where, for all that is shewn, this Police Magistrate had no jurisdiction.

Draper, C. J.—The case for the prosecution may be thus condensed. The express car of a railway train which was passing through the county of Scott, in the State of Indiana, one of the United States of America, was broken into and plundered by a party of five or six and probably more men; two or three of whom fired at the conductor of the train, who endeavoured to stop them as they were moving off with the engine and this car. The first shot was fired when the conductor was about eight feet from the man who fired, and the ball passed through the conductor's coat near his body. The conductor knew the man who fired it, he being a brother of the prisoner Reno The two prisoners are positively sworn to by the express messenger as having broken into the express car, with a third, whom he afterwards saw in custody and identified, and who was the man that fired the first shot at the conductor.

It is better in the first place to dispose of the merely formal objections. First, as to the first (so-called) return. It is in truth no return, but contains matter of excuse only for not obeying the writ. The second section of the Habeas Corpus Act (31 Car. II.) provides how the charges for bringing up the body are to be paid or secured, and a return which amounts to no more than a statement that such charges were not provided for, and that therefore the writ was not executed, is useless and nugatory. Further, I apprehend that on a writ of *habeas corpus* returnable before a judge in Chambers, the return must have been brought to and read before him, before any officer of the Court could file it. I do not think that what was done in this case amounted to filing of the return. If it had, I should have had no difficulty in ordering it to be taken off the files in order that a proper return

might be made; and in some mode (not made the subject of enquiry or objected to), this has been done, for when the writ was first brought before me at Chambers, it had a full and formal return to it. Leonard Watson's case, 9 A. & E. 734, is an authority for amending a return to a *habeas corpus*, which would have abundantly sustained the application to amend had amendment been necessary. In my opinion there has only one return been made to this writ which I can notice or act upon, and that is the return stating two commitments of these prisoners, and this having been openly read has been duly filed.

As to the form of the second warrant the objection was not taken by the prisoners' counsel, but after hearing the case argued at length, I examined the papers and noticed the matter, and subsequently called the attention of the prisoners' counsel to it.

Hawkin's Pleas of the Crown, Bk. 2, ch. 13, sec. 22, says that a warrant ought to set forth the day and year wherein it is made, and (sec. 23) that it is safe, but perhaps not necessary in the body of the warrant to shew the place where it is made, yet "it seems necessary to set forth the county in the margin at least, if it be not set forth in the body."

In strictness it is not indispensable that the authority of the magistrate should be shown on the face of the warrant, for the omission may be supplied by averment and parol evidence: 2 Hale 122. In Hawk. P. C bk. 2 ch. 16, sec. 13, it is laid down that a commitment must be in writing, under the hand and seal of the person by whom it is made, expressing his office or authority, and the time and place at which it is made, and must be directed to the gaoler or keeper of the prison. In this warrant, the Police Magistrate, in the recital states his authority thus: "being Police Magistrate in and for the said County of Essex, appointed under 28 Vict., ch. 20." The committal is adressed to the constables as well as to the gaoler of the County of Essex, and the committal is to the gaol of that county. It further appears that Mr. McMicken, the Police Magistrate, held then—and still holds—his commissions under the Great Seal of the Province, issued under the statute of that Province (28 Vict. chap. 20), appointing him to be a Police Magistrate, and to be and act as such Police Magistrate in all the counties and unions of Counties in Upper Canada, including the County of the City of Toronto. It must also be borne in mind that the offence charged against the prisoners does not fall within the established rule and practice that every offence against our law must be inquired of, tried and determined, within the county, &c., wherein it was committed. This offence was, as is charged as having been committed in a foreign country, and the authority to take any proceedings with respect to it is founded on the treaty of Washington (August, 1842) and on the statute of the Dominion of Canada. 31 Vict. ch. 94. Under this statute and the Statute of 28 Vict, and his commissions, there can be no doubt that Mr. McMicken had authority in every county in Ontario to exercise jurisdiction over cases of this kind.

The pressure of other business (as I was the only Judge in town) compelled me to defer giving judgment until yesterday evening, when I was a little startled to hear for the first time an objection raised by the prisoner's counsel, that the Act 28 Vict. ch. 20 had expired, and with it the authority of the Police Magistrates; and as there was then no time to examine into the enactments bearing on the point, the case stood over until this morning.

I have no doubt now that there is nothing whatever in the question raised.

The statute of Canada (28 Vict. ch. 20) authorizes the Governor to appoint fit and proper persons to act as Police Magistrates within any one or more counties in Upper Canada. Section 3 defines their powers, and they clearly relate to the administration of Justice.

This statute received the Royal Assent on the 18th March, 1865, and was to continue in force for two years, and thence until the end of the next ensuing session of Parliament.

On the 29th March, 1867, the Act erecting the Dominion of Canada was passed, and it was brought into operation (by proclamation) on the 1st July following. Among the powers which this statute assigns exclusively to the respective Legislatures of the Provinces is the administration of Justice therein.

By section 65, all powers, authorities and functions, which before and at the Union were vested in or exercisable by the respective Governors or Lieutenant Governors of Upper Canada, Lower Canada or Canada, shall, so far as the same are capable of being exercised after the Union, in relation to the Government of Ontario and Quebec respectively, be vested in, or may be exercised by, the Lieutenant-Governors of Ontario and Quebec respectively, &c. See also section 66.

By section 137, the words "and from thence to the end of the then next ensuing session of the Legislature, or words to that effect, used in any temporary Act of the Province of Canada, not expired before the Union, shall be construed to extend to and apply to the next session of the Parliament of Canada, if the subject matter of the Act is within the powers of the same, as defined by this Act, or to the next sessions of the Legislatures of Ontario and Quebec respectively, if the subject matter of the Act is within the powers of the same, as defined by the Act."

By 31 Vict. ch 17 the Legislature of Ontario continued this statute until the first day of January, 1869.

I have no difficulty in holding that the statute 28 Vict. relates to the administration of Justice, and is within the powers of the Legislature of Ontario; and if I were not free from doubt I could not, while not clear in an opposite conclusion, refuse to adopt the evident construction which the Legislature of this Province have put on section 137 in relation to this particular statute, by continuing it, as already stated.

I do not think the Statute of Canada, 31 Vic. ch. 83, at all affects this conclusion.

Coming to the remaining question of law arising on the facts of this case, it must be observed that the proceeding against the prisoners is founded on the Statute of Canada, 31 Vic. ch. 94. The recital of that act states the treaty of 9th August, 1842, between Her Majesty and the United States of America, providing for the mutual delivery of all persons, who, being charged

with the crime of murder, or assault with intent to commit murder, or piracy (and some other offences), should seek an asylum, or should be found within either territory, "provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed." Under the first section, the magistrate in this case had clear authority to initiate proceedings against the prisoners, and upon their apprehension on a warrant issued by him, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as, according to the law of this Province (Ontario), would justify their apprehension and committal for trial if they had committed the crime charged therein, to issue a warrant for their commitment to the proper gaol, which in the present case is the gaol of the county of Essex.

The statute gives no authority, except to commit for the purposes specified in the act. If the evidence does not justify this step the accused must be discharged—there can be no bail required as a condition of discharge.

There is some language of Lord Tenterden in the case of *Rex* v *Gourlay*, 7 B. & C. 669, not inapplicable to such a case. I may quote it *verbatim*: "The commitment authorized by the Act of Parliament is very peculiar. It is not a commitment for safe custody, in order that the party may afterwards be brought to trial within our jurisdiction; nor is it a commitment in execution." It is a commitment for safe custody only until the Governor, on a requisition made by the United States, shall, by his warrant, order the persons committed to be delivered to the person authorized by the United States to receive them, to be tried for the crime charged; or the Governor may order their discharge, as a copy of all the testimony taken before the committing magistrate is to be transmitted for his (the Governor's) information. This provision was not contained in the two former statutes. The question of extradition or discharge is therefore vested exclusively in the Governor General, whose decision may possibly be influenced by considerations which a court could not entertain; and, as appears to me, all that the committing magistrate—or the judge or court before whom the accused is brought upon *habeas corpus*—has to do, is to determine whether the evidence of criminality would, according to the laws of this Province, justify the apprehension and committal for trial of the accused, if the crime charged had been committed (or alleged to have been committed) therein.

Following this as the rule, there appears to me no doubt that there was evidence to sustain a charge of assault with intent to commit murder. But it is objected that this is not the charge laid in the first information, which, on the contrary, is in these words: that the prisoners "did feloniously shoot at Americus Whedon, with intent in so doing, him, the said Americus Whedon, feloniously, wilfully and of their malice aforethought to kill and murder." It certainly would have been the more prudent course to have followed the precise description of the offence given by the statute; but if the charge, as laid in the information, involves an assault with intent to commit murder, and the evidence sustains the charge of assault with that intent, and after the evidence taken the accused are committed on a charge following the very words of the treaty and statute, I think it would be discreditable to the administration of the law if the verbal variance between the information and the statute were allowed to prevail. That shooting at a man with intent to murder him involves an assault, cannot be denied. An assault with intent to murder may be proved in various ways, when by an act of violence it is the intention of the assailant to murder. Here, the particular mode in which it was endeavoured to execute that intent—a mode which includes an assault is expressed—it limits the charge to one particular mode of assaulting, but it is not the less a charge of assault with the felonious intent; and unless the precise words of the statute must be followed, it expresses the same charge which the statute expresses. If the words of the statute were exactly followed, the charge would be well laid; but the converse is not true, viz, that the charge is insufficiently made unless the very words are followed I think, therefore, that the first warrant might be upheld.

As to the second warrant, there is no such difficulty, but it is objected that the facts proved are as much evidence of other felonious intent as of the intent to murder, and therefore the intent to murder is left uncertain on the evidence, and so there is not sufficient evidence of the offence of an assault with intent to murder. The question of intent is for the jury. I apprehend that if on such evidence before one of our Courts a jury found a prisoner guilty of an assault with intent to murder, it could not be denied that the evidence fully warranted the finding. If so, this objection fails.

It has also been urged, and very strongly, that the evidence shews that the intent of the parties in the first instance was to steal—not to murder: that the shooting at, with intent to murder the conductor, was no part of the original intent: that a new intention to commit a different felony—though coupled with an act to commit it—can only be fastened on those who actually shared in both the new intent and the act, and that the evidence does not establish this against the prisoners. After carefully examining the evidence, I am not prepared to say that it may not and ought not to satisfy a jury that these two prisoners and Simon Reno were all three together when the shots were fired, and that two of the prisoners, possibly each of them, shot at the conductor. They were, according to Harkin's deposition, the three who entered the express car almost directly after the shots were fired. There were others of the party at the same time on the engine, managing it. I do not perceive the bearing of the case of *Rex.* v. *Cruse* 8 C. & P. 541; 2 Mod. C. C. R. 53. It establishes that the jury must be satisfied that the prisoners must have had in their minds, at the time of the shooting, an intent to murder. I think there is evidence to go to a jury to lead to that conclusion, as I think, if the conductor had been killed, there was evidence against them all of murder.

As to the effect to be given to the evidence put in on behalf of the prisoners before the com-

mitting Magistrate, I consider, for the purposes of this case, that it was properly received. Some portion of it was given by persons on whose character and respectability the prisoners' counsel appeared to place little reliance, and there was some important evidence by way of rebuttal. But that such evidence, when offered by way of answer to a strong *prima facie* case, would have justified the Magistrate in discharging the prisoners, I cannot for a moment admit. Indeed I have not been free from doubt whether it was not the intention of the Legislature by the last Act (31 Vict) to transfer to the Governor General exclusively the consideration of all the evidence, that he may determine whether the accused should be delivered up. If there is not sufficient evidence of criminality the Magistrate ought not to commit; if there is, I think he ought, notwithstanding there is evidence sufficient, if true, to sustain an *alibi*. On *habeas corpus*, the Court or a Judge would determine upon the legal sufficiency of the commitment to hold the accused in confinement. and would further review the Magistrate's decision as to there being sufficient evidence of criminality. As at present advised, I think they would leave any other considerations presented by the evidence brought forward by the accused to the Governor. I do not venture to say there would be no exception to this course. But it is very easy to point out the danger that contrasting conflictin gevidence—considering the credibility of witnesses and similar matters—might lead to. It would for many purposes be assuming the functions of a jury, and trying the whole merits of a case upon an enquiry instituted only to ascertain if there is such evidence of criminality as would justify the apprehension and committal—not the conviction—of the accused. The treaty would be waste paper if a Magistrate, appointed to conduct only a preliminary investigation. should, after hearing sufficient evidence of criminality, take upon himself to decide that the incriminating evidence was worthless, or was displaced, because witnesses on the prisoner's behalf swore to a state of facts inconsistent with the incriminating evidence—for example, as in the present case, swearing to an *alibi*. If the Magistrate discharges the accused because he thinks their witnesses are entitled to more credit than those for the prosecution, he goes not only beyond the letter, but also, as I think, beyond the true meaning of the Act, which only confers authority on him to enquire whether the evidence of criminality is, according to the laws in force here, sufficient to sustain the charge. If he discharges because the evidence *pro* and *con*. is equally strong, and he cannot tell which side is telling the truth, he is, in my humble judgment, equally in error, because he is assuming the functions of the tribunal to which belongs the trial of the prisoner's guilt, instead of limiting himself to the question directed by the statute.

I have heard an intimation that a contrary course has been adopted in a case in this Province—that after positive testimony had been given to establish the offence charged, a witness for the accused was admitted, who swore that he, the parties accused and the witness who swore positively against them, had confederated to get possession of the money, not by an act of robbery with violence, but by the willing connivance of the person in charge of it, and who was the principal witness against the accused: in effect, that he was a *particeps criminis* in embezzling or stealing the money, which was not, therefore, obtained by robbery, and therefore the crime actually committed did not come within the treaty, and that this conclusion was arrived at, and the accused was discharged. The facts may not have been accurately stated to me, but, assuming such a case, I could not have brought myself to such a conclusion. I do not enquire what effect such evidence would or ought to have before a tribunal sitting to try the accused on a charge of robbery; but I repeat what has often been said, that we must assume that courts in other countries will be governed by the same general principles of justice which prevail in our courts; that they will give the proper weight to the evidence for the defence, as our courts would give, and that to them should be left—so far as the merits are concerned at least—the trial of those questions which would be tried in similar cases by our own tribunals. The object of the treaty is to subject parties, against whom a charge coming within the statute is sustained by sufficient evidence of criminality, to be put upon trial before the proper tribunal. It would be defeated if, on making the preliminary enquiry, the case on both sides were heard, and, in effect, so far as the execution of the treaty is concerned, were disposed of.

I decline to discharge these prisoners.

1. Because I am of opinion, that the committing magistrate had lawful authority to deal with the case.

2. Because I think there was sufficient evidence of criminality.

3 Because I think there was a sufficient warrant of commitment.

4 Because my refusal to discharge does not conclude the prisoners, for the statute confers upon a higher functionary the power to grant or to withhold the warrant for extradition.

Order accordingly.

Dean v. Thompson.

Time for taking next step after disposal of summons.

1. When a summons for leave to plead several matters has been disposed of after the time for pleading has expired, the defendant must plead instanter, otherwise the plaintiff may on the same day sign judgment for want of a plea.
2. The rule is otherwise when the summons is for security for costs, in which case the defendant has the whole of the day to plead.

[Chambers, Oct. 14, 1868.]

The defendant, on the 17th September, obtained an order for eight days further time to plead, agreeing to take short notice of trial. On the 25th September, the last day for pleading, defendant made an application for leave to plead several pleas, and on the same day he obtained a summons for security for costs, asking in it for a stay of proceedings. Both summonses were returnable on the 26th at ten o'clock. On the return of the summonses cause was shown, and shortly after ten o'clock the order for leave to plead several pleas was granted, and the application for security for costs refused. It did not appear whether the pleas were filed, but copies of those

allowed were served at a quarter to four p m. of that day. In the meantime judgment was signed at twenty-nine minutes to eleven, or thereabouts.

The defendant then obtained a summons calling on the plaintiff to shew cause why the judgment signed for want of a plea to the plaintiff's declaration herein, and the execution issued thereon, and proceedings subsequent to said judgment should not be set aside with costs for irregularity, in that the said judgment was signed too soon, as the defendant had the whole of the day in which his summons for security for costs and for leave to plead several matters were disposed of in which to file his pleas; or why the said judgment should not be set aside on the merits, and in the meantime all proceedings were stayed.

The following cases were cited in support of the summons:—*Abernethy* v. *Patton*, 6 Scott 586; *Wells* v. *Secret*, 2 Dowl. 447; *Beazley* v. *Bailey*, 16 M. & W. 58; *Spenceley* v. *Shoults*, 5 Dowl 582, and other cases referred to in Ch. Arch. (1856) 245, 1602, 1605.

English, for plaintiff, referred to Ch. Arch. 9th Ed. 214, 1508; *Bebb* v. *Wales*, 5 Dowl. 458; *Glen* v. *Lewis*, 20 L J. Ex. 71, 81; *Hughes* v. *Walden*, 5 B. & C. 770.

Morrison, J.—I regret that I must make the summons absolute, as the impression made on my mind upon an examination of the case is, that the summons obtained for staying proceedings until security for costs was given was taken out for the purpose of delaying the plaintiff and throwing the case over the last Belleville Assizes. If the only summons pending was the one for leave to plead several matters, and the time for pleading had expired when the Judge had disposed of the application, the plaintiff's judgment would, I take it, have been regular, unless the time for pleading had been enlarged. (See *Glen* v. *Lewis*, 8 Ex. 132.) But the case is different with respect to the application for security for costs and staying the proceedings. It is quite clear that upon the return of that summons the plaintiff's proceedings were stayed, and, as held by Lord Tenterden in *Hughes* v. *Walden*, 5 B. & C. 770, and which is the leading case, the defendant had, as a reasonable time, the whole of the day on which the rule was disposed of to take his next proceeding. In *Mengens* v. *Perry*, 15 M. & W. 537, which was a case of a summons for particulars of plaintiff's demand, the decision in the case of *Hughes* v. *Walden* was followed as the rule and practice, and both of these cases were adhered to in *Evans* v. *Senior*, 4 Ex. 818. Here the judgment was signed on the day the applications were disposed of, and upon the strength of these authorities I must hold that the judgment was signed too soon.

It was pressed very strongly by Mr. English and supported by the affidavit of the plaintiff's attorney, that the application for security for costs was not a *bona fide* one, but an abuse of the right to make such an application, and to throw the plaintiff over the assize, and that in such case the summons would not operate as a stay, as said in Chitty's Arch., 1595, 9th ed. I have not before me either the grounds upon which that summons was obtained or how disposed of. If the plaintiff desires it, I shall, as in the case of *Bebb* v. *Wales*, 5 Dowl. 458, refer it to the Master to report whether or no the summons was taken out *bona fide*, and if not, the summons will be made absolute upon payment of costs. If the plaintiff's counsel does not take that course the summons will be absolute, but without costs.

Purdy v. Rowlands.

Irregularity—Style of case.

Writ of summons in Queen's Bench, *T. H. B. Purdy* v. *Rowlands*. Declaration by mistake in Common Pleas. *J. F. H. Purdy* v. *Rowlands*. Motion to set aside declaration for irregularity is properly made on affidavits entitled as in latter cause.

[Chambers, October 16, 1868.]

A writ of summons was sued out in the Court of Common Pleas, from the office of a Deputy Clerk of the Crown at the suit of T H. B Purdy, to which the defendant appeared. The declaration filed and served was by mistake entitled in the Queen's Bench, and at the suit of John T. H. Purdy, and mis-recited the date of the issue of the writ, whereupon the defendant obtained a summons entitled in the same manner as the declaration, calling on the plaintiff to shew cause why the declaration filed herein, the copy and service thereof, or some or one of them, should not be set aside for irregularity, with costs, on the grounds:—

1. That no writ of summons was ever issued, or if issued, served in this action, to ground the said declaration.

2. That this action was not commenced by writ of summons, as required by the statute on that behalf, the first proceeding of any kind taken herein being the filing of the said declaration.

And why, in the meantime, all further proceedings should not be stayed.

O'Brien shewed cause, and objected that the motion was made, and that the affidavits filed in support of it were entitled in the wrong cause, there being, according to the contention of defendant, no suit in court as that entitled in the Queen's Bench, and that if the declaration is anything it is an irregular declaration in the suit in which defendant appeared, viz. in the Common Pleas.

Osler, contra, referred to *Ross et al.* v. *Cool et al.*, 9 U. C. C. P. 94.

Draper, C J., held that the motion was properly made, and made the summons absolute.

Order accordingly.

CHANCERY CHAMBERS.

(Reported by J. W. Fletcher, Esq., Barrister-at-Law.)

Eastman v. Eastman.

Practice—Re-taxation of costs.

[Chambers, 26th Sept., 1868.]

Henderson moved for an order to re-tax the bill of costs of plaintiff, or rather that the taxation should be opened, and that he should be allowed to attend before the Master. He stated in support of the motion, that he did not impeach the regularity of the proceedings upon the taxation, but

sought a re-taxation of said costs on the ground that through inadvertence no person attended upon the taxation in the interests of his clients. The taxation appeared regular, and no particular items of the bill, as taxed, were objected to, but he thought on a re-taxation he could succeed in having the bill further taxed down. The application was supported by an affidavit, showing the facts.

Donovan, contra This motion is irregular An application of this nature must be by way of petition, and not on notice of motion. The application, even if technically proper, cannot succeed, as no merits are shown. No particular items of the bill are pointed out as exorbitant or erroneous—no improper conduct is alleged.

Re Catlin, 18 Beav. 598, was cited.

The Judges' Secretary.—I must refuse this motion. No improper items being pointed out in the bill, as taxed, I can grant no relief.

Archibald v. Hunter.

Practice—Amending bill of complaint after expiry of 28 days from filing of answer.

[Chambers, 2nd Oct., 1868.]

In this suit the defendants had filed their answer; the plaintiffs had taken out and served order to produce, but only two of the defendants had filed their affidavits on production. More than twenty-eight days had elapsed since the filing of the last answer; the plaintiff was not, therefore, entitled to an order of course to amend.

S. H. Blake, on behalf of the plaintiff, moved, on notice, for an order giving the plaintiff liberty to amend the bill in certain particulars, or as he might be advised. He read the order to produce, with admission of service thereof, and produced a certificate of the state of the cause, showing that the defendant Fairweather had not filed his affidavit on production. He contended that the plaintiff could not safely amend without production by all the defendants, and that as they had not all produced, the plaintiff was entitled to the order asked. He submitted that order 81 did not apply in this case. The plaintiff was compelled to make this application through the default of the defendants. He put in an affidavit showing that it was desired to amend the bill, and that this could not prudently be done until all the defendants had produced. Under the general orders the court had power to make the order he asked, and he submitted the order in its terms should be as wide as possible.

Chadwick, contra, contended that the plaintiff had not shown diligence in compelling production by the defendants, and that he was therefore not entitled to the order asked. The plaintiff might have moved to commit Fairweather for non-production, and have made him produce before the twenty-eight days had expired. He cited *Crawley* v. *Poole*, 1 W. & M. 66.

The Judges' Secretary.—I think the plaintiff should have leave to amend his bill generally. It is sworn that he could not amend until after the defendants had complied with the order to produce, and although two of them filed their affidavits in April, the third, appearing by the same solicitor, did not file his until September. The wording of the order as to allowing amendments after the expiry of twenty-eight days from the filing of the answer, does not, I think, stand in the way of my giving the plaintiff such an order. The power of the court to extend the time for doing any act is expressly saved by the general orders, and I am only putting the plaintiff in the position he would have been in had the defendants all obeyed the order within the proper time. The costs should be costs in the cause. I do not give them to the defendants, as their default has rendered the application necessary, and I do not give them to the plaintiff, as he did not take active steps to enforce the production.

Read v. Smith.

Practice—Allowance of Error and Appeal Bond.

[Chambers, 5th Oct., 1868.]

In this suit the defendant, Smith, had filed his petition of appeal to the Court of Error and Appeal, and had filed the usual bond, and now moved for its allowance.

Fletcher, contra, contended that under order 28 of the Error and Appeal orders, this motion was unnecessary. The practice in Chancery was to serve a notice of filing the bond upon the solicitor of the opposite party, and if the bond be not moved against by the respondent within fourteen days from the service of such notice, it stands allowed without any motion.

The Judges' Secretary dismissed the motion with costs.

Smith v Henderson.

Practice—Carriage of decree.

[Chambers, Oct. 14, 1868.]

McGregor, on behalf of the defendant, moved for the carriage of the decree on the ground that the plaintiff had not taken the decree into the Master's office, although more than fourteen days had elapsed since the said decree had been passed and entered.

Fletcher, for the plaintiff, admitted the fact that the decree had not been taken into the Master's office within the fourteen days, but contended that under order 211 of the General Orders this motion was unnecessary. Under that order the defendant, without leave of the court or notice to the plaintiff, might assume the carriage of the decree. It was formerly necessary, under order 42, sec. 1, of the recently repealed orders, to apply, on notice, in Chambers, for the carriage of a decree, but the new order had made a change in the practice in this respect.

The Judges' Secretary.—I think under General Order 211 that this motion is unnecessary. The motion must, therefore, be dismissed with costs.

ENGLISH REPORTS.

CROWN CASES RESERVED.

Reg. v. John Marsden.

Wounding constable with intent to resist lawful apprehension Fresh pursuit—Evidence.

A police-constable, having interfered to stop an altercation near the house where the prisoner lodged between the prisoner and another man, was struck by the prisoner and they had a struggle. The constable then went for assistance, and after an hour returned with W. and two other constables to the house—within which the prisoner had retired, all then being quiet. The prisoner having refused to open the door, one of the constables fetched a serjeant of police, and he and one of the constables having gone to the back door, W. and the two others forced open the front door, and in apprehending the prisoner, who had a bill-hook in his hand, and threatened to kill the first man who came up, W. was wounded by the prisoner, who struck him on the head with the hook.

Held, that the apprehension, after the lapse of an hour, was unlawful, the first transaction having then come to an end; and therefore that a conviction for wounding W. with intent to resist his lawful apprehension must be quashed.

[16 W R., 711, April, 1868.]

Case reserved by Smith, J.:—

The prisoner was tried and convicted before me at the spring assizes, 1868, at Warwick, on an indictment which charged him with feloniously wounding George Wesson, a police constable, with intent to resist his lawful apprehension.

The facts were that the prisoner lodged at his father's house in Lower Town street, Nottingham. About twelve o'clock on the night of Saturday, the 29th February, the prisoner, suspecting a man called Wormald was listening at the windows of the house, came into the street and used threatening language to him. Raison, a police constable, came up and interfered to put a stop to the altercation, and the prisoner then turned upon him and struck him with his fist, and there was a struggle between them. Raison, the police constable, then went away for assistance and remained absent for an hour. In the interval he changed his plain clothes for his uniform, and he returned to the house with three other constables, Wesson, Ash, and Harabin. The prisoner had then retired into the house and all was quiet. The door of the house was closed and fastened. Raison asked the prisoner to open the door and he refused. The constables tried the door several times, and after an interval of ten minutes or quarter of an hour finding they could not get into the house, they determined to send for a serjeant of police. One of them went to the police station distant about half a mile then, and after another interval of fifteen or twenty minutes returned with Serjeant Hind. The serjeant and Harabin went to the back door; Raison, Wesson, and Ash remained by the front door. These three constables again demanded admission, and were refused, and they then forced open the front outer door and entered the house. The constables saw the prisoner stand on the top of the stairs with a bill-book in his hand. Raison asked the prisoner to come down. He refused and threatened to kill the first man who came up. Wesson then said, "Here's at him," and the three constables Wesson, Raison, and Ash ran up stairs to lay hold of him.

The prisoner then struck Wesson with the hook upon the head and wounded him—a struggle ensued in which Raison was also wounded by the prisoner with the hook. The prisoner was overpowered and taken into custody, having himself received severe wounds on the head from the constables in the struggle.

It was contended for the prisoner that the apprehension was not lawful—the assault was over—there was no further assault or affray to be apprehended, and no such fresh pursuit as would justify the constables in breaking into the house or apprehending the prisoner (see *R.* v. *Gardener*, 1 M. C. C. 390; *R.* v. *Walker*, 2 W. R. 416, Dearsley's C. C. 358)

I reserved these points for the consideration of the Court for Crown Cases Reserved. I did not pass sentence, and detained the prisoner in custody. If the apprehension was not lawful it is to be taken that there was no excess in this resistance offered by the prisoner.

No counsel appeared on either side.

Kelly, C.B.—In this case a police officer having heard an altercation between the prisoner and another man, interfered to stop it, when a struggle took place between the officer and the prisoner, and the latter struck the officer a blow with his fist. The officer then went away to seek for assistance, and at the end of an hour returned with some other officers and broke into the house within which the prisoner had in the meantime taken refuge. In the course of the struggle which then took place he received the wound for which the prisoner was indicted. Under these circumstances the question is whether this indictment for feloniously wounding with intent to resist the prisoner's lawful apprehension can be maintained. That depends upon whether this was a lawful apprehension, and that upon the question whether the struggle upon the stairs was a continuance of the first transaction, when no doubt the prisoner might have been lawfully apprehended. But between the two times an hour had elapsed, and it is therefore impossible to say that the second struggle was a continuance of the same transaction, or that this was such a fresh pursuit as to justify the acts of the constables. All the first matter having come to an end we are of opinion, independently of authority, that this conviction must be quashed. If, however, we had any doubt, the case of *R.* v. *Walker* (*supra*) is conclusive.

Smith, J., concurred. His opinion at the trial was in favour of the view taken by the prisoner's counsel; but, on account of the importance of the question, he reserved the case.

Conviction quashed.

COMMON PLEAS.

Bell v. Aitken and Others.

Practice—Costs of Country Attorney where trial in town.

The costs of the country attorney's attendance at a trial in town will not usually be allowed on taxation as between party and party, but the Master has a discretion to allow them in exceptional cases.

[16 W. R. 704, May, 1868.]

This was a patent case of considerable importance and difficulty. The plaintiff laid the venue in London; the defendant and his attorney resided at Stockport.

The defendant's country attorney attended at the trial in town, and (the defendant having

succeeded in the action) claimed to be allowed, on taxation, his costs of such attendance.

The Master, however, refused to allow these costs, on the ground that it was the invariable practice not to allow the costs of the attendance of the country attorney at a trial in town.

Thesiger having obtained a rule calling on the plaintiff to show cause why the master should not review his taxation,

Watkin Williams now showed cause against it.

Bovill, C. J.—I am of opinion that this rule must be made absolute. It is important that cases of this kind should be strictly watched, and that two attorneys should not be charged for where one is sufficient. In ordinary cases it is not necessary for the country attorney to attend.

Here the master has declined to exercise his discretion in the matter, considering he was bound by the general rule. That rule is a very proper one, and only to be departed from in exceptional cases. But in this case the presence and advice of the country attorney was important. The plaintiff has chosen to lay the venue in London, and it would be hard if the defendant were deprived of the assistance of his attorney or compelled to pay his costs. I think it right that the master should enquire into the matter.

Byles, J.—The general rule is a very salutary one. All we say is that the master should exercise his discretion in a case like the present

Rule absolute.

CHANCERY.

Lord Brougham v. Cauvin.

Suit to recover possession of documents—Summons for production and inspection.

Where a depositee of documents claimed to retain them by way of lien for work done upon them by him for the depositor.

Held, that the depositor was entitled to the common order for production and inspection of the same documents in a suit to recover possession of them.

[16 W. R. 688, May, 1868.]

This was the usual summons for production of documents, adjourned into court.

The plaintiff having determined to take steps for the publication of an autobiography entered into negotiations with the view of securing the assistance of the defendant in collecting, selecting, and arranging the materials for the proposed work. Mr. William Brougham, who acted for the plaintiff in the matter, made a verbal arrangement with the defendant in reference thereto, but nothing was said as to the amount of remuneration which the latter was to receive for his services. However, he undertook the work and commenced in the early part of 1867. The plaintiff had in his possession many very valuable papers, letters, and other documents, stated to amount to many thousands in number, relating to the various events of his public life, and the chief business of the defendant was to collect, arrange, select, and make extracts from these various documents with a view to the preparation of the proposed work.

The defendant was put into possession of these documents, and continued to work upon them almost down to the present time.

The plaintiff being recently desirous of recovering possession of them applied to have them handed back to him, but the defendant refused to do so except upon payment, by way of remuneration, of a sum which the plaintiff considered exorbitant, and claimed to retain the papers by way of lien for the amount of his demand.

The plaintiff thereupon filed the bill in the present suit by which he prayed that the papers in question might be decreed to be handed back to him upon payment by him of sum such by way of remuneration as the Court should think reasonable.

The plaintiff applied by summons in chambers in the usual way for production and inspection of the documents in question in the suit, and as the application was opposed by the defendant it was on the suggestion of the chief clerk adjourned into court.

Jessel Q. C. (*O. Morgan* with him), after stating the facts, was stopped by the Court.

Baggallay, Q. C., and *W. W. Cooper*, for the defendant, contended that this was not the usual application for production of documents. It was not required for the purpose of discovery, for the only decree to which the plaintff could be entitled was one directing inquiries, and inspection was not required for that purpose. The result of granting the application would be that the plaintiff might take a note of the results of the defendant's work, and thus derive the benefit of his labour, and then take his bill off the file.

Lord Romilly, M.R.—This is, in my opinion, a most unreasonable offer. The bill is filed to get back certain papers which have been entrusted to the defendant to enable him to perform a work for the plaintiff. The depositee is entitled to retain them till he has been paid for work and labour undertaken for the depositor.

Two cases may be supposed. First, that he has done nothing to them. In that case is not the plaintiff to be entitled to show at the hearing that no work has been done? In the second case if work has been done is he not entitled to see what is the amount and nature of such work?

Everybody knows that a person who has a lien does not lose it by inspection. But a suggestion has been made that the plaintiff may get the benefit of the defendant's work and then abandon the suit. But in that case he would have to pay the costs of the suit and be liable to an action at law by the defendant. I never heard of a more unreasonable opposition to the order, but as the chief clerk appears to have approved of the adjournment into court I shall give no costs.

In re F—— (A Solicitor).
In re 6 & 7 Vic. c. 73.

Solicitor and client—6 & 7 Vict. c. 73, s. 37.

Taxation ordered upon an application made after the expiration of twelve months after delivery of the bill, on the ground of the continuance of the relation of solicitor and client subsequently to the delivery of the bill.

[M. R. 16 W. R. 749.]

A summons for the taxation of seven bills of costs, three of which had been delivered more than twelve months before the summons was taken out. Down to the 18th of December, 1867, Mr. F. was the solicitor of the applicants, who were executors and trustees of a will, and acted as such solicitor in a suit for the administration of the testator's estate, in which the applicants

were defendants. Mr. F. also received and paid moneys on account of the testator's estate, and there was an account current between him and the applicants in respect of such receipts and payments. The decree in the suit, made on the 29th of June, 1867, directed the usual accounts to be taken against the applicants. Mr. F. carried in his bills under the decree, which had been delivered by him at the following periods, namely, two on the 7th of December, 1866, one on the 31st of January, 1867, four and a cash account on the 31st of January, 1868. In the cash account Mr. F. discharged himself by setting off the amount of his bills against the moneys which had come to his hands on account of the applicants. The chief clerk having refused to allow the bills unless moderated the present summons was taken out. It was admitted that the overcharges were not excessive, but the ground of the application was, that if the bills were not referred for taxation the applicants would have to bear personally the difference between the amount which the chief clerk was disposed to allow on the bills and the sum total of the bills as delivered. *Jessel*, Q. C., and *Martineau*, in support of the summons, relied on the continuance of the relation of solicitor and client as a special circumstance to exempt the three former bills from the operation of the twelve months rule. The existence of this relation rendered it incumbent on the solicitor to inform his client of what the result would be if he failed to apply for taxation before the expiration of the twelve months. They referred to the dictum of Knight Bruce, L.J., in *Re Nicholson*, 7 W. R. 774, 8 DeG. F. & Jo. 100.

Baggallay, Q. C., and *Waller*, for Mr. F., referred to *Re Strother*, 5 W. R. 797, 3 K. & J. 518.

Lord Romilly, M.R.—I think that the continuance of the relation of solicitor and client after the delivery of the bill is a special circumstance within the meaning of the Act. Let these bills be referred to the taxing master accordingly.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Allegheny Savings Bank v. Meyer & Bro.

Attachment of debts.

A garnishee in an execution attachment is not liable for interest on the money in his hands, due the defendant therein, while the action is pending.

Where the garnishee, a bank, in its answer by the cashier, sets out an account with defendant, showing a balance in his favor at time of service of attachment, but states further, that a check of a third party on another bank credited among the deposits has been protested for non-payment and remains in its hands unpaid—which leaves defendant indebted to the bank—the whole answer should be taken in connexion, and judgment should not be against the garnishee on its answer.

A garnishee's answer is not to be construed with the same strictness as a defendant's affidavit of defence. Judgment will not be entered against him thereon, unless he expressly or impliedly admits his indebtedness to or his possession of assets belonging to the judgment debtor, and the admission ought to be of such a character as to leave no doubt in regard to its nature and extent.

Error to Common Pleas of Alleghany County.

The opinion of the court was delivered at Pittsburgh, Nov 16, 1868, by

Williams, J.—The Alleghany Savings Bank, plaintiff in error, was summoned as garnishee of John Kerwin in an attachment execution issued on a judgment against him at the suit of Joseph Meyer & Bro., the defendants in error. The writ was executed May 27th, 1867, and the bank having answered the interrogatories filed by the plaintiffs in the attachment execution, the court below, on the 3rd of January, 1868, ordered that judgment be entered against the bank for the sum of $1,855.80, with interest from the 27th May, 1867, to wit: $1,921.58, to be levied of the debt due by the bank to John Kerwin. The entry of this judgment is assigned for error.

Were the plaintiffs in the attachment execution entitled to a judgment against the bank on its answer to their interrogatories?

The bank, if indebted to Kerwin, was not liable for interest on the amount of its indebtedness between the day of the service of the writ and the entry of the judgment. This point was expressly ruled in *Irwin* v. *The Pittsburgh and Connellsville Railroad Co.*, 7 Wr 488; and it was there held that a garnishee in an attachment execution is not liable for interest on the money in his hands due the defendant thereon, while the action is pending. So far, therefore, as the judgment in this case includes interest on the principal sum, for which it was entered, it is clearly erroneous. But this is not the main question raised by the assignment of error.

Was there such an admission of indebtedness to Kerwin by the bank as to warrant the entry of a judgment for the principal sum included therein?

It is true that the account annexed to the answer shows that, on the 27th of May, 1867, the date of the service of the attachment execution, there was a balance against the bank in favor of Kerwin amounting to $1,855.80. But this amount must be taken in connection with the cashier's answer. In his answer to the third interrogatory he says:

"There was a balance of $762 10 in his (Kerwin's) favor on the 25th day of May, 1867: and, on the 27th day of May, 1867, he deposited money and checks of other persons, on different banks, amounting to $6,421.20, and immediately drew a check in favor of A. Crane for $5,328 00, which was paid; and which left a balance to his credit when the attachment was served of $1,855.80."

If the answer had stopped here the judgment, so far as it is for this balance, would have been clearly right. But the answer proceeds as follows:

"In the deposit of $6,421.20 was a check of Hugh Richardson, on the Union National Bank of Pittsburgh, for $2,500, payable to John Kerwin or bearer, which was protested for nonpayment, and which remains in our possession unpaid to-day, which leaves John Kerwin indebted to this bank $644.70, until Richardson's check is paid"

Now, taking the whole answer together, and giving it a reasonable construction, does it admit or show an indebtedness by the bank to Kerwin of $1,855 80, the principal sum for which judgment was entered? On the contrary, does it not allege an indebtedness of Kerwin to the bank of $644 70 in consequence of the nonpayment of Richardson's check? But it is contended that because Richardson's check is cre-

dited in the account as cash, the presumption is that it was taken and received by the bank as cash. But is not this presumption met and rebutted by the answer? If Richardson's check was taken and received as cash, the fact that it was protested for non-payment, and still remains in the possession of the bank unpaid, would not leave Kerwin indebted to the bank in the sum of $644.70, as alleged in the answer; and in this respect the answer would not be true. There may have been an agreement between the bank and Kerwin that all checks deposited by him and credited in his account as cash, if not paid on presentation, should be made good by him; or he may have indorsed Richardson's check; and, in either event, its protest for non-payment on presentation, and its remaining in the possession of the bank, unpaid, at the date of the answer, would leave Kerwin indebted to the bank as stated by the cashier. As his answer was drawn up without the advice or assistance of counsel, he may have unwittingly omitted to state the facts upon which Kerwin's liability for the check, and the bank's right to set it off against the balance appearing in his favor depend. If Richardson's check was received absolutely as cash, without indorsement by Kerwin, and without any agreement on his part to make it good, if not paid on presentation, the cashier could hardly have supposed that its non-payment would render him liable therefor, and entitle the bank to charge him therewith. A garnishee's answer is not to be construed with the same strictness as a defendant's affidavit of defence. A defendant, under our affidavit system, is bound to set forth every fact material and necessary to his defence; and every fact, not distinctly and positively averred, is presumed not to exist. The affidavit must show *prima facie* that the defendant has a good defence to the action, otherwise judgment will be entered against him. But a garnishee is not bound to set forth "specifically and at length the nature and character of his defence" to the attachment. He is only required to answer the interrogatories that may be submitted to him. And judgment will not be entered against him on his answer, unless he expressly or impliedly admits his indebtedness to, or his possession of assets belonging to the judgment debtor; and the admission ought to be of such a character as to leave no doubt in regard to its nature and extent.

We are of the opinion that the answer in this case does not contain such a clear and distinct admission of indebtedness by the bank to Kerwin as would warrant the entry of a judgment against it for the balance appearing in his favor on the face of the account, and the judgment of the court below must, therefore, be reversed

Judgment reversed and procedendo awarded.

We were rather startled by reading in a recent number of a leading English law periodical that "*Lord Commissioner* Richards, *Q. C.*, has been appointed Chief Justice of the Queen's Bench in Ontario." We presume the writer intended to refer to Mr. Richards, late Chief Justice of the Common Pleas. We should have supposed it quite impossible for our "big brother" to have made a mistake even in a trifle like this:

GENERAL CORRESPONDENCE.

Can an Attorney collect a bill for professional business done in a Division Court?

To the Editors of the Canada Law Journal.

Gentlemen,—This seems at first sight, as asking a strange question of you, or any legal minds. One would suppose that the common sense of the thing — that the self-evident right of a lawyer to collect for work done in any court, or in any capacity professionally—under a responsibility as he is for his acts—would be so plain that none (much less a judge in a court) would question it. I had the misfortune, may I say? to have this question come up before a County Judge in an out county, near Toronto, lately, in trying to collect bills in two of his Division Courts, and of having the rule laid down, that he could not give me, as an attorney, the proved items of my bills, which in any other court would have been allowed. This happened in two different courts in two different suits. In both instances I produced to him and proved, at considerable expense and trouble, *written* retainers, *employing me to do the business charged as an* attorney, and agreeing to pay for it. Yet I was told that attornies have no right to collect bills in Division Courts for business done therein. It struck me as strange that any man, especially a person placed in the responsible position of a judge, could have a mind so constituted, as not to be able to see that he was not only trampling on a well-known principle of law, *but much more on every principle of* natural *equity*. Any one who knows what equity is, knows that no client has a right to employ a man as a lawyer to do work, which he could not do—to do what is strictly professional business, such as writing a lawyer's letter, attending to examine judgments, papers, affidavits, and drawing affidavits of a special kind, and giving special directions how to serve and the time to serve—and after the work is done turn round and say, "You did the work but not in a court of record, and you shall get no pay!" Any one sitting as a judge, who ought to know what law is, ought to know that the common law of England distinguishes between professional work, skilled work, and mere manual labor. The artist is not paid, the doctor is not paid, the lawyer is not paid, nor the skilled artizan, as a mere

laborer is. Why? because in all such cases the person doing the work is supposed, is legally bound, to bring to his work, *professional, skilled knowledge*, under legal responsibilities.

So any man employing a lawyer *as such* in a Division Court, is bound to pay him for his work as such. A case just decided by ex-Chief Justice Draper in Chambers goes the extent of saying the bill of costs of attorneys for any business done by them as such may be taxed,—see *In re O'Donohoe and Warmoll*, 4 Prac. Rep. 266. I recollect a case distinctly that was argued some ten years ago before the late Chief Justice Robinson sitting in full court, in which counsel propounded the doctrine, that a lawyer could not charge for business *attendances, affidavits*, &c., made or written in the Division Courts, and that learned man at once said, "I cannot assent to that doctrine. I think that any one employing a lawyer to do business in such courts impliedly undertakes to pay him his reasonable charges." This point was not directly in issue, and only came up incidentally, but I noted it at the time. Now suppose a man comes to a lawyer and says, "Mr. A., I have been sued in the Division Court, and had a snap judgment given against me. I wish you to examine it, set it aside, get me a new trial, and advise me on it." The lawyer does as requested, makes a dozen attendances and examinations, draws notices and affidavits, argues matters before a judge, &c., and then makes out his bill and sues it, but is told by a judge, "Sir I cannot give you your bill," and turns the attorney out of court, in one case with $1, and in the other with one-third of his bill. That was my case. But it puzzled me to see how, or on what principle, I got in one case $1 (it cost me about $8 to get it), and in the other $6 (just my travelling expenses and a little over), to a country town. The judge had (upon his way of reasoning) no right to give even this small pittance—it would have been a mercy to say I will give nothing, and make each party pay his own costs!

I think it is high time a little more thought should be exercised in the selection of County Judges. Now I happen to know that many of our older County Court Judges do not act as the judge here alluded to. They take a more rational view of law and equity. I assert with confidence that the law will not turn a lawyer out of court, where he has done work *as such* in any Court in Canada upon the retainer of a client.

Why should not a reasonable fee be allowed a lawyer for drawing affidavits, writing letters, notices, &c., as well as for drawing deeds? Why should not a lawyer have a fee of 25 cts. or 50 cts. for making attendances for hours together to see books and argue cases before a judge? Why should he not be paid for his time as a professional man? Do doctors not construct a tariff? Does not the architect charge his $4 or $10 a day?

Is the lawyer not liable for his ignorance and neglect? If so, why is he not entitled to collect for any professional work? I am sure I have only to state the case to show the legality and reasonableness of my view.

An Attorney.

Toronto, 8th Dec., 1868.

Anecdote of the late Lord Chancellor.—There is in the House of Commons a certain noble lord whose name it will be better not to mention, but who has somewhat recently appeared in the, to him, new character of a law maker. This noble lord met at a dinner party, a few weeks ago, a certain great "city man," whose transactions in stock amount yearly to a fabulous sum. The young legislator began to talk in the City man's hearing of Cabinet secrets, and to do so with a very great assumption of knowledge on the subject. "Talk of Cabinet secrets," at last cried Mr. Consol, "there is one secret—the secret of a Cabinet Minister, too—that I should uncommonly like to know. It would be worth 5000*l.* to me if I knew what judgment Lord Chelmsford will give to-morrow in the case of Bloxham and the Metropolitan Railway.' "Five, thousand pounds!" cried his aristocratic neighbour, who is as poor as any lord need wish to be, "do you mean to say you would give 5000*l.* to any one who could tell you what old Chelmsford's judgment will be?" "Yes; indeed I should," said the other. "Then, by Jove, I'll find out and tell you." "Do so," said the City man, with a laugh, as he went on with his soup. That very night, when the tired merchant in his Bayswater palace was wooing gentle sleep, quite forgetful of his conversation with this young sprig of the nobility, he was roused by a summons at his bedroom door. His servant on being admitted told him that Lord——'s valet was below with a message for him. "Show him up," said Mr. Consol, in wonder as to what it all meant. Enter the valet, who speaks as follows:—"Beg your pardon for disturbing you, sir, but my lord sent me with a note to Lord Chelmsford's, and said I was to bring the answer to you. I took the note, sir, and Lord Chelmsford told me to say there was no answer!" The story is a strange one, but it is true nevertheless.—*Leeds Mercury*.

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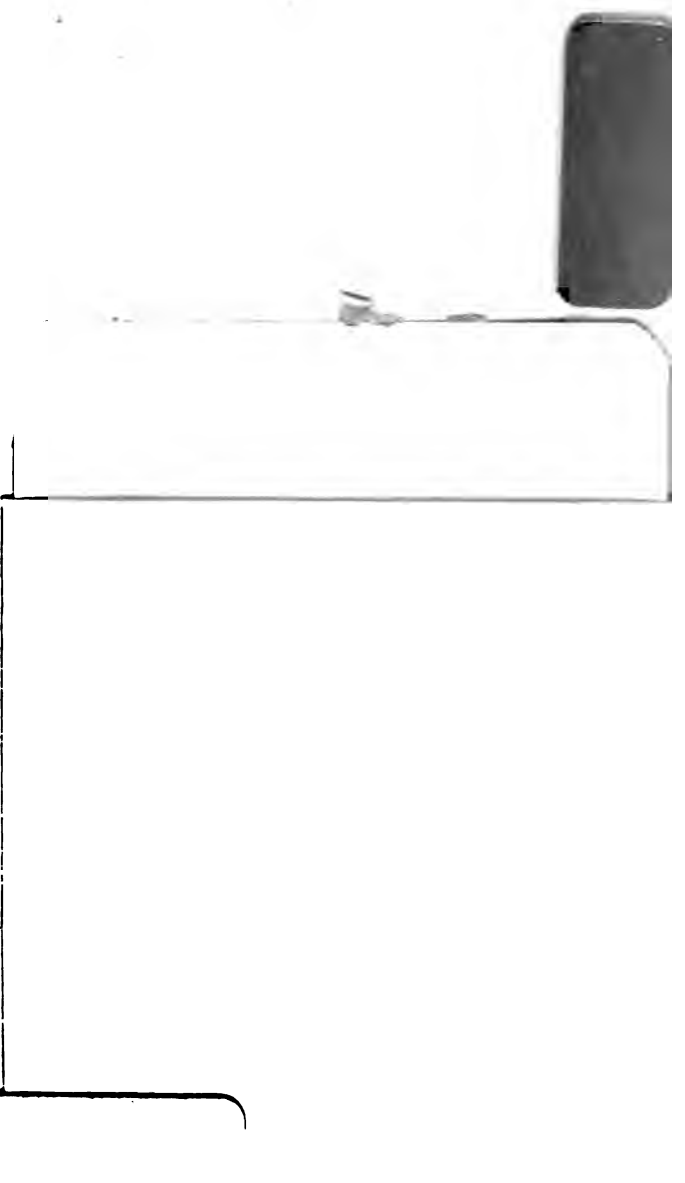

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